No. 05-547

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,
Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Respondent.

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

BRIEF OF FORMER GENERAL COUNSELS OF THE IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOSE ANTONIO LOPEZ

NEAL MOLLEN *
CHARLES A. PATRIZIA
LISA J. BROWN
CHRISTOPHER T. TIMURA
PATRICK J. TOGNI
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1700

* Counsel of Record

June 19, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether an immigrant who is convicted in state court of a drug crime that is a felony under the state's law but that would only be a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 05-547

JOSE ANTONIO LOPEZ,
Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Respondent.

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

BRIEF OF FORMER GENERAL COUNSELS OF THE IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOSE ANTONIO LOPEZ

INTERESTS OF *AMICI CURIAE*

This brief is submitted on behalf of *amici* Owen B. Cooper, David A. Martin and Paul W. Virtue (the "*amici*"), pursuant to Rule 37 of the Rules of this Court, with the written consent of both petitioner and respondent, whose consent letters have been filed with the Clerk of Court.[1]

[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

Each of the *amici* served as General Counsel of the Immigration and Naturalization Service ("INS"). In that capacity, *amici* were responsible for the INS legal proceedings program, and supervised the hundreds of INS attorneys who represented the government in removal proceedings in the immigration courts nationwide. In addition, *amici* were responsible for advising the Attorney General, the Commissioner of the INS, and the INS's operational and policy components on all aspects of the Immigration and Nationality Act ("INA").[2] Owen B. Cooper served as General Counsel from October 1999 to February 2003, and is currently Of Counsel in the Washington, D.C. office of Paul, Hastings, Janofsky & Walker LLP. David A. Martin served as General Counsel from August 1995 to January 1998, and is currently the Warner-Booker Distinguished Professor of International Law and Class of 1963 Research Professor at the University of Virginia. Paul W. Virtue served as Deputy General Counsel from November 1988 to January 1997, as Acting Executive Associate Commissioner for Programs from January 1997 to February 1998, and as General Counsel from March 1998 to May 1999, and is currently a Partner with the Washington, D.C. office of Hogan & Hartson, L.L.P.

Amici strongly support enforcement of this country's immigration laws and worked diligently throughout their government service to improve the government's practices regarding the removal of aliens with criminal records from the United States. In this brief, *amici*, from their unique perspective as former senior officials responsible for the enforcement of the immigration laws, offer the Court insights into the considera-

---

[2] As part of the Homeland Security Act of 2002 [*hereinafter* "HSA"], Pub. L. No. 107-296, 116 Stat. 2135, Congress created the Department of Homeland Security ("DHS"), abolished the INS, and transferred the functions of the INS to DHS. HSA at § 471(a), 116 Stat. 2135, 2205. The transfer took effect on March 1, 2003, and the immigration law and policy functions for which *amici* were responsible are now carried out by DHS.

tions that inform the conduct of removal proceedings; the centrality of individualized decision making to the effective administration of the immigration laws; the consequences of the Congressional decision to restrict individualized decision-making where an alien is alleged to have committed an "aggravated felony"; and the practical and legal significance of an unnecessarily expansive reading of the "aggravated felony" definition. *Amici* leave to others a detailed examination of the proper application of the aggravated felony drug trafficking category to particular state dispositions of drug possession offenses.

SUMMARY OF ARGUMENT

Sound enforcement of the immigration laws requires processes that take individual circumstances into account regarding an alien's admissibility into or deportation from the United States. In the normal course of events, individual circumstances are considered through the Congressionally mandated two-step removal proceeding in immigration court. In the first step, the immigration court, acting on allegations by the government, determines whether a person is subject to removal on the basis of the statutory grounds, *e.g.*, for having remained beyond the period of admission, for violating the terms of admission, or for having been convicted of certain categories of crimes. Once it is determined that the person is subject to removal, the immigration court ordinarily then considers whether the person qualifies for and should be granted relief from removal. Such relief may be granted, for example, where the enforced departure could result in persecution of the person by others, where a person's long residence justifies continued permission to remain lawfully in the country, or where the person may qualify for citizenship through naturalization. The immigration court, on the basis of the person's individual circumstances, may grant relief from removal despite a determination that a basis for removal exists.

Issues of relief from removal typically arise only once the case has reached the immigration courts and a determination has been made that the person is subject to removal. This consideration of the individual circumstances is a central aspect of the effective administration of the immigration laws, especially given the intricate combinations of circumstances and equities that such cases inevitably present. Removal obviously can have significant personal, indeed life-threatening, effects, as well as effects on family and society. A foreign national might face political, religious, or other persecution if deported, or a person may be eligible, if removal proceedings are terminated, to pursue naturalization and become a United States citizen. The removal proceeding in immigration court is the central, and often the only, forum in which careful decisions on these weighty issues can be made. It is the forum in which a detailed analysis of the individual circumstances of a case is best undertaken, and in which representatives of DHS can assist the immigration court in testing the credibility and qualifications of the alien who is subject to removal proceedings, and make recommendations as to whether removal or relief is the appropriate outcome.

In recent decades, Congress determined that some conduct was so egregious that it would justify denying the ordinary discretionary consideration of relief, and in those cases restricted or eliminated the second stage of the removal process. To define this conduct, Congress designated certain categories of crimes as "aggravated felonies." *Amici* acknowledge the clear authority of Congress to designate such offenses, and to make the decision that convictions for such crimes should trigger an exception from the normal process in immigration court and bar most or all avenues of relief. Nor do *amici* argue here that Congress improperly chose specific crimes to include within the "aggravated felony" definition in the INA. Rather, because the "aggravated felony" categorization has such sweeping consequences, and essentially

eliminates the capacity of the immigration enforcement system to differentiate among individual circumstances, *amici* urge that this Court assure that the categorical exclusion applies only where Congress has clearly and unequivocally decided to treat a specific type of conviction as an aggravated felony. Absent such a clear statement, the courts should treat crimes as outside of the "aggravated felony" definition, so that the immigration system remains open to consider the normally available forms of relief from removal. This interpretation of the "aggravated felony" definition would not obstruct the power of the government to enforce the removal of criminal aliens where appropriate. Most foreign nationals with criminal convictions that fall outside that definition would still be removable based on the crime, and ample authority exists to permit the government's attorneys to argue for a discretionary denial of relief when appropriate. Such an interpretation would protect the capacity of the removal system, and the immigration judges, DHS attorneys, and other officials participating in the removal process, to make individualized decisions in all but the cases in which Congress has clearly called categorically for removal.

ARGUMENT

I. THE REMOVAL PROCESS NORMALLY, AND CRITICALLY, IS PREMISED UPON INDIVIDUALIZED DECISIONS ABOUT BOTH WHETHER AN ALIEN IS REMOVABLE AND WHETHER PARTICULAR CIRCUMSTANCES WARRANT RELIEF FROM REMOVAL

The removal process begins when DHS issues a Notice to Appear ("NTA") charging an alien with any applicable ground of deportability or inadmissibility under the INA.[3] The pro-

[3] INA §§ 239-40, 8 U.S.C. §§ 1229, 1229a.

ceedings take place before an immigration judge.[4] The NTA is not itself an order of removal. Instead, it initiates a determination by an immigration judge as to whether the charged ground renders the alien removable from the United States.

Once removability is charged or established, however, the immigration laws allow specific exceptions to delay or even obviate removal. These exceptions from removal, even for those who are removable under the law, provide an essential mechanism to consider and realize parallel policy goals of the INA in appropriate cases.

The law of asylum, for example, permits persons fleeing persecution to obtain refuge in this country and later apply for permanent status.[5] Withholding of removal provides a similar, but more limited means, to avoid the removal of an alien to a territory where his life or freedom would be threatened without granting asylum as such.[6] Cancellation of removal allows lawful permanent residents who have resided in the United States for an extended period to obtain a weighing of the equities for and against permanent removal.[7] Termination of a case in immigration court in order to permit processing by DHS of a citizenship application allows those who, *prima facie*, meet the requirements for citizenship (principally, a minimum of five years in the United States since being admitted as a lawful permanent resident) to apply for naturalization and obtain a full determination of their eligibility.[8] Certain waivers of inadmissibility can be available in depor-

---

[4] Both before and after enactment of the HSA, the immigration court process is administered by the Executive Office for Immigration Review ("EOIR"), which is housed within the Department of Justice. HSA at § 1101; 6 U.S.C. § 521(a).

[5] INA § 208, 8 U.S.C. § 1158.

[6] INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

[7] INA § 240A(a), 8 U.S.C. § 1229b(a).

[8] 8 C.F.R. § 1239.2(f).

tation proceedings, for example, where deportation would result in extreme hardship to a qualifying family member who is a citizen or permanent resident of the United States.[9] Voluntary departure provides those who must leave the country with a stated period to tie up their affairs and pay their own way to depart.[10]

The removal proceeding typically is the sole process in which facts can be considered in light of these distinctive policy goals that contemplate removal and relief from removal. The proceeding affords an opportunity for the alien to respond to the allegations of removability in the NTA, and to raise specific bases upon which removal might be cancelled, limited, or even obviated by naturalization. In this context, the DHS counsel has the opportunity—otherwise missing, since it is not a part of the information that goes into the decision to issue an NTA—to see, test, evaluate, and express positions to the court on such information. On the basis of this process, and of the judge's own fact-finding activities, the immigration judge can reach a deliberate, fully informed decision whether to order removal.

II. WHERE A CONVICTION IS CLASSIFIED AS AN AGGRAVATED FELONY, INDIVIDUALIZED DETERMINATIONS OF RELIEF FROM REMOVAL ARE GENERALLY PRECLUDED

Beginning in 1988,[11] Congress passed a series of amendments to the INA to limit the eligibility of those convicted of

---

[9] INA § 212(h), 8 U.S.C. § 1182(h).

[10] INA § 240B, 8 U.S.C. § 1229c.

[11] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

serious criminal offenses for certain immigration benefits. Under these changes, those found guilty of "aggravated felonies" became subject to removal on this new and separate basis (though nearly all were already removable on other grounds, such as conviction of a controlled substance offense or of a crime involving moral turpitude).[12] More importantly, the aggravated felony provisions rendered such persons ineligible for certain immigration benefits such as asylum and naturalization, and ineligible to seek or be granted certain discretionary remedies, such as cancellation of removal or voluntary departure. Congress has expanded the list of aggravated felonies in successive amendments of the INA.[13]

In creating the "aggravated felony" category, Congress determined that some conduct was so antithetical to the basis on which an alien could seek to obtain or retain residence rights, much less progress toward citizenship, that persons guilty of such conduct should not only be subject to removal, but should have no ability to present factors weighing against removal. That is certainly a choice within the Congressional power, and it is a choice that *amici* sought to enforce during their terms in office. *Amici* also agree with the basic underlying policy reflected in the statutory architecture—to impose a bright-line rule limiting the issues that may be litigated by removal respondents who have been convicted of unquestionably serious offenses. Although we recognize that there are many legitimate arguments that Congress may, as a matter of policy, have unwisely expanded the list of aggravated felonies beyond those clearly appropriate, we do not question here the list that Congress has adopted. Rather, in this brief, we urge the Court to adopt a narrow approach in interpreting the reach of that list in order to best fulfill the

---

[12] *See, e.g.*, INA § 237(a)(2)(A)(i), (B)(i), 8 U.S.C. § 1227(a)(2)(A)(i), (B)(i).

[13] The current definition is at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

overall Congressional intent as to general immigration policy and the proper functioning of the immigration system.

A foreign national's conviction of an offense properly found to be within the "aggravated felony" category eliminates the capacity of the immigration process to consider any of the avenues of relief described above.[14] Because the consequences of this label are therefore so severe, the Court should give careful consideration to this practical impact when deciding whether Congress clearly intended for certain conduct to fall within the "aggravated felony" definition.

While Congress certainly identified some criminal conduct as deserving of a bar to equitable consideration of other factors, a far broader range of criminal offenses can trigger

[14] An alien that has been convicted of a "particularly serious crime" that "constitutes a danger to the community of the United States" is barred from seeking asylum. Under the asylum provisions, an aggravated felony is a particularly serious crime. INA §§ 208(b)(2)(A)(ii), 208(b)(2)(B)(i), 8 USC § 1158(b)(2)(A)(ii), 8 USC § 1158(b)(2)(B)(i). For withholding of removal claims, aggravated felony convictions that involve a sentence of more than 5 years are to be considered particularly serious crimes and therefore act as an automatic bar to withholding for removal claims. INA § 241(b)(3); 8 U.S.C. § 1231(b)(3)(B). Notwithstanding this length of sentence threshold, the Attorney General in *In re Y-L, In re A-G, and In re R-S-R-*, 23 I. & N. Dec. 270 (BIA 2002), determined that drug trafficking offenses are presumed to be *per se* "particularly serious crimes" unless specially enumerated "extraordinary and compelling circumstances" are shown. For naturalization purposes, aggravated felons are, by definition, unable to demonstrate that they have the good moral character required for grants of citizenship. INA § 101(f)(8); 8 U.S.C. § 1101(f)(8). Aliens who have been convicted of an aggravated felony are ineligible for cancellation of removal. INA § 240A (a)(3); 8 U.S.C. § 1229b(a)(3). Aliens who have been convicted of an aggravated felony are also not eligible for § 212(h) relief. 8 U.S.C. § 1182(h); *In re Yeung*, 21 I. & N. Dec. 610 (BIA 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639. Aliens who are convicted of an aggravated felony are not eligible for grants of voluntary departure. INA § 240, 8 USC § 1229a.

removability, independent of the "aggravated felony" label and the resulting bars. With respect to drug offenses, for example, the government has wide powers to charge an alien having a drug conviction with deportability. Section 237(a)(2)(B) of the INA, 8 U.S.C. § 1227(a)(2)(B), provides that all drug convictions, other than a single conviction for possession of less than 30 grams of marijuana, are grounds of deportability. In addition, INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), defines "conviction" broadly to include many dispositions that would not constitute a "conviction" under state law.[15] As a result, an expansive application of the aggravated felony definition is completely unnecessary to enhance the ability of the government to charge an alien with deportability and to enforce the removal of persons who have committed such crimes.

III. ADMINISTRATIVE AND LOWER COURT DECISIONS HAVE CREATED CONFUSION CONCERNING THE AGGRAVATED FELONY CATEGORY AND IMPROPERLY BROADENED ITS REACH

The particular issues in this case arose in an environment where the agency and the courts vacillated in interpreting the appropriate reach of the "drug trafficking" aggravated felony definition to state drug possession convictions.[16] In the years

---

[15] Under these provisions state court dispositions that are not convictions under state law, such as deferred adjudications, are nonetheless treated as convictions under immigration law.

[16] Agency interpretations have shifted over time. *Compare In re Davis*, 20 I. & N. Dec. 536 (BIA 1992) (holding that a state misdemeanor conviction for conspiracy to distribute a controlled substance is analogous to illicit trafficking in controlled substances and therefore qualifies as an aggravated felony), *with In re K-V-D-*, 22 I. & N. Dec. 1163 (BIA 1999) (holding that a Texas state felony conviction for possession of a controlled substance, which was a felony under Texas law but would be a misdemeanor under federal law, is not an aggravated felony conviction), *and In re Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002) (rejecting *In re K-V-D-*

prior to 1996, attention focused on aliens with serious criminal sentences who sought to obtain relief from deportation despite lengthy prison terms. Then, the primary role of the aggravated felony drug trafficking definition was to preclude relief for those who committed criminal acts that judges found serious enough to warrant a sentence of five years or more in prison.[17] But in the years since 1996, prison sentences no longer play a direct role in determining eligibility for relief. Increasingly, the aggravated felony label itself, whether or not any significant jail time has been imposed, serves as the sole determinant of eligibility for relief.[18] The

---

and holding that the rule adopted by the majority of circuit courts should apply in the absence of a specific and controlling circuit court rule). Of course, the federal circuits differ too in their application of aggravated felony definition. Courts in the Second, Third, Sixth, Ninth, Fifth, and Eighth Circuits have addressed the issue of whether certain state-law drug offenses are drug trafficking crimes and thus aggravated felonies. The Second Circuit, *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996), Third Circuit, *Gerbier v. Holmes*, 280 F.3d 297, 312 (3d Cir. 2002), Sixth Circuit, *United States v. Palacios-Suarez*, 418 F.3d 692, 697 (6th Cir. 2005), and Ninth Circuit, *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 910 (9th Cir. 2004), have concluded that drug related offenses that do not contain a trafficking element are not drug trafficking crimes, while the Fifth Circuit, *United States v. Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001), and Eighth Circuit, in this case, has concluded that state-law drug offenses that do not contain a trafficking element, but which are considered felonies under state law, are drug trafficking crimes even when these crimes are not felonies under federal law.

[17] Under former INA §212(c), a lawful permanent resident with an aggravated felony conviction who had served five years in prison was ineligible for that particular form of relief from deportation. Cases about the reach of the aggravated felony definition, therefore, typically involved people whose convictions resulted in at least a five year sentence of imprisonment.

[18] *See, e.g.*, *Salazar-Regino v. Trominski*, 415 F.3d 436, 448 (5th Cir. 2005) *petition for cert. filed*, 74 U.S.L.W. 3395 (U.S. Dec. 22, 2005) (No. 05-830) (holding that a state felony drug possession case that resulted in a deferred adjudication was an aggravated felony conviction for removal purposes).

issues here are whether and how the categorical exclusion should be applied to low level felonies or state misdemeanors that may involve little or no prison term. *Amici* urge the Court to approach these issues carefully, and mindful of the purpose of the aggravated felony definition and its functional role in the statutory scheme for determining the appropriate resolution of asylum, citizenship, deportation and relief matters.

As emphasized above, properly applied, the aggravated felony definition serves a useful role in reaching a prompt resolution in cases where the balancing of equities would almost certainly result in denial of discretionary relief. However, the variation in state criminal justice systems creates the very real danger that the process of matching the federal definition to state convictions will operate to prevent consideration of relief where relief would otherwise be appropriate.

This danger is all the greater when the aggravated felony categories are read expansively. The laws of South Dakota, which are at issue in this case, provide a good illustration. South Dakota punishes almost all drug possession convictions as felonies. If all of South Dakota's drug felonies were presumed to be aggravated felonies for federal immigration law purposes, only a very small number of persons with South Dakota drug convictions—namely those with a conviction for between one and two ounces of marijuana—would fit in the gap between the deportability grounds and the aggravated felony label and so could ask an immigration judge to consider a discretionary grant of relief from removal. Predictably, this would lead to many cases in which an assessment of the relevant equities, as considered in equivalent cases involving convictions in other jurisdictions, might weigh strongly against deportation, but the immigration court would be precluded from awarding relief, or even gathering and considering information relevant to such equities. An appropriately tailored reading of the aggravated felony category, in contrast, would

preserve the ability of DHS and the immigration courts to consider the nature of a particular crime rather than simply the jurisdiction in which it was committed.

IV. AN IMPROPERLY BROAD READING OF THE AGGRAVATED FELONY CATEGORY INTERFERES WITH THE EXERCISE OF SOUND PROSECUTORIAL AND ADJUDICATORY JUDGMENT IN REMOVAL PROCEEDINGS

In addition to providing for flexibility in the enforcement of the immigration laws, statutory forms of relief from removal provide government counsel with an invaluable—and often the only real—opportunity to exercise their discretion based on an evaluation of the evidence. In the removal proceeding, but only in that proceeding, DHS counsel can review the documents that support relief, test the credibility of witnesses, evaluate the underlying facts of the case and make judgments that go beyond the label applied to a conviction. Likewise, and at any stage in the administrative process, government counsel generally has the option to agree to a form of relief or to waive appeal. When the aggravated felony label is applied to a conviction, however, trial counsel has no opportunity to consider arguments by or on behalf of a respondent for appropriate relief. Instead, the only alternative to removal is declining to commence removal proceedings without ever having had a chance to test in court the quality of the claim for relief. From a law enforcement standpoint, that Hobson's choice is no substitute for full consideration on the merits.

A. The Cancellation Process Example

A brief summary of the cancellation of removal ("cancellation") process, as applied to aliens who had been admitted as lawful permanent residents but are now deportable (primarily because of a criminal conviction) demonstrates the role and value of relief mechanisms in the effective administration of

the law. By statute, cancellation is available only to persons who have been lawful permanent residents for five years,[19] and who have accrued at least seven years of residence after admission (in any status) prior to the commission of the offense that leads to a conviction.[20] Even then, cancellation depends on a showing that removal is contrary to the "interest of the United States."[21] This judgment is based on facts adduced in the specific case, such as rehabilitation, military service to the United States, strong ties to this country, and weak ties to the country of origin.

An applicant for cancellation of removal bears the burden of proving that he or she is eligible for and deserving of relief. The alien will normally testify about the actual circumstances behind a conviction, which may involve conduct for which the person was not convicted. Any claims of rehabilitation must also be supported by testimony and documentary evidence that demonstrates the validity of the claim.

At the cancellation hearing, government counsel tests the credibility of the applicant for relief and the depth of the evidence of rehabilitation through cross-examination and through evidence such as the individual's criminal history, if it extends beyond the charged ground of deportability. The court proceeding also provides an opportunity to test the strength of equitable factors, such as family ties, service in the armed forces of the United States, and lack of ties to the country of origin.

This process contemplates a structured inquiry into the equities that support relief from removal. It is analogous to a sentencing hearing in which the judge considers the evidence

---

[19] INA § 240A(a)(1), 8 U.S.C. § 1229b(d).

[20] INA § 240A(a)(2) & (d), 8 U.S.C. § 1229b(a)(2) & (d).

[21] *In re C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998) (incorporating standard for evaluating claims for relief from *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978)).

and analyzes the factors that may warrant a lesser penalty in the individual case.

If cancellation is granted, it serves as the functional equivalent of a grant of probation. The past conviction is excused, and the person's lawful status restored, yet enforcement safeguards remain. By statute, the alien is barred from any future grant of cancellation.[22] Thus, if a lawful permanent resident with a grant of cancellation is thereafter convicted of a deportable crime, he or she can no longer seek cancellation.

B. Exercise of Discretion

If the DHS representative is satisfied at any point in the hearing that the applicant has made out a case for relief, the agency may choose not to oppose a grant of cancellation. In such a case, if the judge is satisfied that relief is appropriate, the judge may issue a short decision indicating that neither side will appeal. Similarly, even without an earlier statement that the government will not oppose relief, if the government attorney is persuaded that the judge has reached an appropriate decision in granting cancellation relief, the government can choose not to appeal.

Thus, at each stage, the cancellation process provides government counsel with valuable tools to make a sound judgment whether to pursue removal or allow the individual one last chance to remain as a lawful permanent resident in the United States.

The flexibility offered in the cancellation context extends to other forms of relief. An award of voluntary departure, for example, eases the burden on enforcement resources, but persons with aggravated felony convictions are ineligible. Similarly, in appropriate cases, government counsel may agree to termination of a removal case in order to allow the individual to pursue citizenship. The termination process allows the

[22] INA § 240A(c)(6), 8 U.S.C. § 1229b(c)(6).

DHS representative to send the case for further development to DHS adjudicators who will investigate and make a full determination of the individual's good moral character and other qualifications for citizenship. The aggravated felony label, however, prevents a DHS attorney from agreeing to proceed in this manner and having citizenship examiners evaluate the evidence of eligibility.

Likewise, unnecessarily expansive applications of the aggravated felony category burden the removal process with cases that could be resolved by the Citizenship and Immigration Services ("CIS") bureau of DHS. When a person applies for asylum, for example, trained CIS personnel in an asylum office can evaluate the evidence of persecution and will consider discretionary factors in determining whether to grant asylum. Conviction of a serious crime, when viewed in full context, will ordinarily result in a discretionary denial of asylum. But if the crime is categorized as an aggravated felony, CIS lacks the discretion to even engage in such an analysis of all relevant factors.

Similarly, expansive application of the aggravated felony label ties the hands of citizenship examiners. An applicant for naturalization must demonstrate his or her good moral character during the five-year period immediately preceding the filing of the application. If the person has been convicted after 1990 of an aggravated felony, DHS cannot grant citizenship no matter how old the offense, regardless of how powerful the other evidence of current good moral character may be in any particular case.

In each of these situations, the procedures for evaluating evidence provide the expert agencies and their personnel with the necessary tools to decide whether a conviction for a crime that is outside the aggravated felony definition in fact warrants deportation, denial of asylum or denial of citizenship. But if the crime falls within the aggravated felony category, government counsel loses the ability to test the evidence and

adopt a position in the case that best meets the broader objectives of immigration enforcement policy.

V. THE RULE OF LENITY, LONG APPLIED IN DEPORTATION CASES, REINFORCES THE REASONS FOR APPLYING THE AGGRAVATED FELONY DEFINITION ONLY WHERE CONGRESS GAVE A CLEAR INDICATION THAT IT SHOULD APPLY

The rule of lenity, disfavoring severe readings of removal grounds absent a clear statement from Congress, is a long-standing and widely applied principle in immigration cases.[23]

The Court in *Fong Haw Tan* said:

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo v. Carmichael*, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since 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.[24]

Courts generally apply the rule of lenity in the immigration context when there is an ambiguity about whether deportation provisions should apply to the petitioner.[25] There is no clear

---

[23] *See Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Costello v. INS*, 376 U.S. 120, 128 (1964); *United States v. Phommachanh*, 91 F.3d 1383, 1385 (10th Cir. 1996); *Barrese v. Ryan*, 203 F.Supp. 880, 887 (D. Conn. 1962).

[24] *Fong Haw Tan*, 333 U.S. at 10.

[25] *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987); *see also Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).

indication that Congress intended the definition of aggravated felony to apply to drug offenses that are felonies under state law, but would be misdemeanors under the federal law, and, as shown above, the consequences are severe if the definition is applied in such a way. The Court should ensure that ambiguous elements in the aggravated felony definition are not interpreted as to hamper the functionally useful capacity of the removal process to make individualized decisions regarding removal and relief.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that this Court should reverse the judgment of the circuit court.

Respectfully submitted,

NEAL MOLLEN *
CHARLES A. PATRIZIA
LISA J. BROWN
CHRISTOPHER T. TIMURA
PATRICK J. TOGNI
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1700

* Counsel of Record

June 19, 2006