No. 05-7664

In the Supreme Court of the United States

REYMUNDO TOLEDO-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Has the Fifth Circuit erred in holding – in opposition to the Second, Third, Sixth, and Ninth Circuits – that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c), and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

LIST OF PARTIES

1. United States of America.

2. Reymundo Toledo-Flores.

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OPINION BELOW

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JURISDICTION

The judgment of the court of appeals (J.A. ____) was entered on August 17, 2005. The petition for a writ of certiorari was filed on November 15, 2005, and granted on April 3, 2006. (J.A. ____) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED

Under 8 U.S.C. § 1101(a)(43)(B),

> **(43)** The term "aggravated felony" means –
>
> * * *
>
> > **(B)** 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). "The term applies to an offense described in this paragraph whether in violation of Federal or State law * * * *" 8 U.S.C. § 1101(a)(43).

In turn, 18 U.S.C. § 924(c) defines the term "drug trafficking crime" as "mean[ing] any felony punishable under the Controlled Substances Act (21 U.S.C. § 801

et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2).

Finally, § 2L1.2 of the Federal Sentencing Guidelines provides as follows:

> **§ 2L1.2. <u>Unlawfully Entering or Remaining in the United States</u>**
>
> (a) Base Offense Level: **8**
>
> (b) Specific Offense Characteristic
>
> (1) Apply the Greatest:
>
> If the defendant previously was deported, or unlawfully remained in the United States, after –
>
> * * *
>
> (C) a conviction for an aggravated felony, increase by **8** levels;
>
> * * * *

USSG § 2L1.2 (emphasis in original).

The commentary to USSG § 2L1.2 provides in pertinent part that, "[f]or purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony." USSG § 2L1.2, comment. (n.2).

STATEMENT

On April 15, 2002, in the 248th District Court of Harris County, Texas,

Petitioner Reymundo Toledo-Flores, a Mexican national, was convicted of the Texas state jail felony offense of simple possession of 0.16 grams of cocaine and was sentenced to seven months' confinement. (Presentence Report ("PSR") 3, 8) On August 23, 2002, Mr. Toledo-Flores was released from that sentence to immigration authorities; and, on November 26, 2002, he was removed to Mexico via Laredo, Texas. (PSR 8)

On February 23, 2004, Mr. Toledo-Flores was apprehended by United States Border Patrol agents near Laredo, Texas. (J.A. ____) He admitted that he had entered the United States illegally the day before by wading across the Rio Grande River. (J.A. ____)

On March 16, 2004, Mr. Toledo-Flores was indicted in the Laredo Division of the Southern District of Texas for felony illegal entry in violation of 8 U.S.C. § 1325.[1] (J.A. ____) On May 3, 2004, Mr. Toledo-Flores pleaded guilty to that charge. (J.A. ____)

Applying Guideline § 2L1.2, the PSR began with a base offense level of eight under USSG § 2L1.2(a) and added eight levels to that pursuant to USSG §

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[1]Mr. Toledo-Flores's illegal entry offense was a felony because it was committed subsequently to another conviction for illegal entry under 8 U.S.C. § 1325. *See* 8 U.S.C. § 1325(a). In fact, Mr. Toledo-Flores had been twice previously convicted of misdemeanor illegal entry under § 1325(a): once on January 14, 2000, in Laredo, Texas, at which time he was placed on probation for five years (PSR 5); and the second time on November 17, 2000, in Del Rio, Texas, for which he was sentenced to 180 days' imprisonment. (PSR 7)

2L1.2(b)(1)(C), on the ground that Mr. Toledo-Flores's 2002 Texas felony conviction for simple possession of cocaine qualified as an "aggravated felony." (PSR 4) After a three-level reduction for acceptance of responsibility, Mr. Toledo-Flores had a total offense level of thirteen, which, coupled with his Criminal History Category of VI, resulted in a Guideline imprisonment range of thirty-three to forty-one months. (PSR 4, 9, 13) Because this range exceeded the two-year maximum prescribed by 8 U.S.C. § 1325, the Guideline "range" became twenty-four months. (PSR 13; *see also* USSG § 5G1.1(a))

Mr. Toledo-Flores objected to the PSR's characterization of his 2002 simple possession conviction as an "aggravated felony." Def. Resp. to the PSR 1-2; *see also* PSR Addendum 14A. He renewed that objection at the sentencing hearing. (J.A. ____) The district court overruled the objection and sentenced Mr. Toledo-Flores to twenty-four months' imprisonment on the felony illegal entry charge,[2] to be followed by one year of supervised release. (J.A. ____)

Mr. Toledo-Flores filed a timely appeal to the United States Court of Appeals for the Fifth Circuit, where he renewed his claim that his 2002 Texas felony conviction for simple possession was not a qualifying "aggravated felony." On August 17, 2005, the court of appeals rejected Mr. Toledo-Flores's argument and affirmed the judgment

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[2]The district court ordered the sentence to run consecutively to a six-month prison term for revocation of probation in the January 2000 illegal entry case. (J.A. ____)

of conviction and sentence. (J.A. ____, ____-____)

This Court granted certiorari on April 3, 2006.[3] (J.A. ____)

SUMMARY OF ARGUMENT

A. A state narcotics conviction qualifies as an "aggravated felony" under Federal Sentencing Guideline § 2L1.2 and 8 U.S.C. § 1101(a)(43) if it constitutes "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a

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[3]According to the Inmate Locator feature of the Federal Bureau of Prisons website (*http://www.bop.gov*, last visited June 15, 2006), Mr. Toledo-Flores was released from federal custody on April 21, 2006, undoubtedly to the detainer placed on him by immigration authorities on February 24, 2004. (PSR 1) His release from federal custody does not, however, render this case moot. While he has completed the imprisonment component of his sentence, Mr. Toledo-Flores is still subject to the supervised release component of his sentence until April 21, 2007. Removal from the United States does not extinguish the term of supervised release. *See, e.g.*, *United States v. Brown*, 54 F.3d 234, 238-39 (5th Cir. 1995).

The existence of the supervised release term gives Mr. Toledo-Flores a concrete stake in the outcome of the question presented and prevents this case from being moot. Particularly, if he prevails in this case, Mr. Toledo-Flores can, on remand, request that the district court, in its discretion, reduce, or eliminate altogether, his supervised release term as equitable partial compensation for any excess imprisonment. "In this case, the possibility that the district court may alter [Mr. Toledo-Flores's] period of supervised release pursuant to 18 U.S.C. § 3583(e)(2), if it determines that he has served excess prison time, prevents [his] petition from being moot." *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006) (footnote omitted); *see also, e.g.*, *United States v. Rodriguez-Munoz*, No. 04-11321, 2006 WL 1209382, at *1 & *3 (5th Cir. May 2, 2006) (unpublished) (finding that appeal of sentence was not moot, notwithstanding expiration of prison sentence, because defendant remained on supervised release, which could be reduced or terminated in the district court's discretion; and, based on finding of sentencing error, remanding for consideration of such relief).

drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). In turn, 18 U.S.C. § 924(c) defines the term "drug trafficking crime" as "mean[ing] any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2).

With respect to convictions for simple possession of a controlled substance, the lower courts have adopted two competing approaches to the phrase "any felony punishable under [the enumerated federal statutes]." Under the State Felony Approach, a conviction for simple possession will qualify as an "aggravated felony" if it is punishable (as a felony or a misdemeanor) under the listed federal statutes and it was actually classified as a felony by the State of conviction. Under this approach – applied by the Fifth Circuit in this case – Mr. Toledo-Flores's conviction for simple possession of 0.16 grams of cocaine was an "aggravated felony," because Texas punished it as a felony, even though this offense is punishable only as a misdemeanor under federal law.

Under the Federal Felony Approach, in contrast, a conviction for simple possession will qualify as an "aggravated felony" only if it is punishable as a felony under federal law. The text, structure, history, policies, and purposes of the statutes at issue here demonstrate that the Federal Felony Approach is the one intended by Congress.

B. Under this Court's decision in *Jerome v. United States*, 318 U.S. 101, 104 (1943), it must be assumed, in the absence of a plain indication to the contrary, that Congress did not intend to make the operation of a federal statute dependent upon the vagaries and disparities of various States' laws. Because the State Felony Approach makes the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(B) dependent upon state law (particularly, whether the State at issue labels and punishes simple possession of a controlled substance as a felony), under *Jerome* and its progeny, Congress would have had to plainly indicate its intent to adopt the State Felony Approach. Congress, however, gave no such "plain indication" of its intent to adopt the State Felony Approach.

C. Indeed, the text and structure of the relevant provisions support the Federal Felony Approach, not the State Felony Approach. The ordinary and natural meaning, as well as the accepted legal meaning, of the term "trafficking," in the context of controlled substances, implies "trading or dealing" in controlled substances – *i.e.*, activities of a mercantile nature that ***exclude*** simple possession. The Federal Felony Approach is a much better fit with the ordinary and natural meaning of the term "trafficking" than the State Felony Approach because, with the exception of the recidivist possessor provisions of 21 U.S.C. § 844(a), the offenses covered by the Federal Felony Approach all target activities within the conventional notion of "trafficking."

The Federal Felony Approach is also supported by the fact that § 1101(a)(43)(B) refers to drug trafficking "as defined in [18 U.S.C. § 924(c)]," not "as defined in [18 U.S.C. § 924(c)***(2)***]" (as the statute read before 1994). The broader reference to § 924(c) includes the limitation – found in § 924(c)(1)(A) – that the "drug trafficking crime" be one "for which the person may be prosecuted in a court of the United States," 18 U.S.C. § 924(c)(1)(A) – *i.e.*, a ***federal*** crime. Read together, these two provisions mean that a "drug trafficking crime (as defined in section 924(c) of Title 18)" must be a ***federal felony***. And this reading comports with how the lower courts have uniformly interpreted the term "drug trafficking crime" for purposes of 18 U.S.C. § 924(c)(1)(A).

Moreover, the Federal Felony Approach best comports with the ordinary and natural meaning of the phrase "any felony punishable under the Controlled Substances Act" in § 924(c)(2) – namely, an offense giving rise to felony punishment under the CSA. That interpretation is confirmed by other statutes in which Congress has used essentially identical language in tandem with separate language explicitly reaching state-law offenses.

In sum, the text and structure of the provisions at issue clearly indicate that Congress intended to adopt the Federal Felony Approach. At a minimum, Congress did not give a "plain indication" that it wanted to adopt the State Felony Approach, as required under *Jerome* and its progeny.

D. The statutory history and legislative history of the provisions at issue also

support the Federal Felony Approach. With respect to the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)(2), this history shows that, before 1988, § 924(c)(2) referred only to ***federal*** drug felonies; and the 1988 legislation that altered § 924(c)(2) to substantially its present language was intended to be only a ***clarification*** of the scope of that statute.

With respect to 8 U.S.C. § 1101(a)(43)(B), the statutory and legislative history indicates that this particular prohibition was aimed at high-level trafficking-type offenses, not low-level possessory offenses. Additionally, that provision's history indicates at least tacit congressional approval of the Board of Immigration Appeals' consistent application of the Federal Felony Approach throughout the 1990s. Accordingly, the statutory and legislative history support the Federal Felony Approach. At a minimum, they fail to override the *Jerome* presumption against the State Felony Approach.

E. Even if the text, structure, and history of the relevant provisions fail to establish the primacy of the Federal Felony Approach, that approach is still unquestionably a ***plausible*** reading of the statutes involved. That being the case, the rule of lenity (and its immigration law counterpart) require adoption of the Federal Felony Approach.

F. Finally, the Federal Felony Approach comports with the policy favoring uniformity of both federal criminal and immigration laws. And, the Federal Felony

Approach avoids the grave constitutional doubts occasioned by the disparate results produced by the State Felony Approach.

G. For all these reasons, the Fifth Circuit erroneously applied the State Felony Approach in deciding Mr. Toledo-Flores's case. This Court should therefore reverse the judgment of the Fifth Circuit.

ARGUMENT

A STATE CONVICTION FOR SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE IS AN "AGGRAVATED FELONY" UNDER 8 U.S.C. § 1101(a)(43)(B) ONLY IF THE OFFENSE IS PUNISHABLE AS A FELONY UNDER FEDERAL LAW. BECAUSE MR. TOLEDO-FLORES'S PRIOR OFFENSE (SIMPLE POSSESSION OF 0.16 GRAMS OF COCAINE) IS PUNISHABLE ONLY AS A MISDEMEANOR UNDER FEDERAL LAW, THE LOWER COURTS ERRED IN TREATING THAT OFFENSE AS AN "AGGRAVATED FELONY."

A. Introduction.

Based upon his 2002 Texas state jail felony conviction for simple possession of 0.16 grams of cocaine, Mr. Toledo-Flores received an eight-level enhancement under Federal Sentencing Guideline § 2L1.2(b)(1)(C), which provides that "[i]f the defendant previously was deported, or unlawfully remained in the United States, after – * * * (C) a conviction for an aggravated felony, increase [the base offense level] by **8** levels." USSG § 2L1.2(b)(1)(C) (emphasis in original). The commentary to USSG § 2L1.2 provides in pertinent part that, "[f]or purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. § 1101(a)(43) without regard to the

date of conviction of the aggravated felony." USSG § 2L1.2, comment. (n.2).

Under 8 U.S.C. § 1101(a)(43), "[t]he term 'aggravated felony' means – * * * **(B)** 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), and "[t]he term applies to an offense described in this paragraph whether in violation of Federal or State law[.]" 8 U.S.C. § 1101(a)(43). In turn, 18 U.S.C. § 924(c) defines the term "drug trafficking crime" as "mean[ing] ***any felony punishable under*** the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2) (emphasis added).

"Courts have adopted two competing interpretations of the phrase 'any felony punishable under' the enumerated statutes listed in § 924(c)(2)." *United States v. Peralta-Espinoza*, 413 F. Supp. 2d 972, 975 (E.D. Wis. 2006) (citations omitted). Under the Federal Felony Approach, "a state drug conviction is considered an 'aggravated felony' if the elements of the crime resulting in conviction would render the defendant liable for a felony under the federal drug laws, irrespective of whether the conviction was actually obtained in the state or federal forum." *Gonzales-Gomez v. Achim*, 372 F. Supp. 2d 1062, 1066 (N.D. Ill. 2005) (citation omitted), *aff'd*, 441 F.3d 532 (7th Cir. 2006). Under the State Felony Approach, however, "a state drug

possession crime is an aggravated felony if it is both punishable under the CSA [Controlled Substances Act] and labeled as a felony by the convicting state, without regard to whether the crime would be punishable under federal drug laws as a felony or only as a misdemeanor." *Id.* at 1067 (footnote omitted).

Mr. Toledo-Flores's prior offense – simple possession of 0.16 grams of cocaine – was a state jail felony under the laws of Texas, *see* TEX. HEALTH & SAFETY CODE §§ 481.102(3)(D) & 481.115(b), but only a misdemeanor under federal law as well as under the law of several other States. *See* 21 U.S.C. § 844(a); *see also, e.g.*, DEL. CODE tit. 16, § 4753; MASS. GEN. LAWS ch. 94c, § 34; 35 PA. CONS. STAT. § 780-113(a)(16) & (b); TENN. CODE § 39-17-418(a) & (c); W. VA. CODE § 60A-4-401(c); WISC. STAT. § 961.41(3g)(c); WYO. STAT. § 35-7-1031(c)(i). Under the State Felony Approach employed by the Fifth Circuit in this case, Mr. Toledo-Flores's prior offense qualified as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B) and USSG § 2L1.2(b)(1)(C). Under the Federal Felony Approach, however, that prior conviction would not have qualified. As will be discussed, the text, structure, history, policies, and purposes of the relevant statutory provisions strongly support the Federal Felony Approach.[4]

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[4]The Second and Ninth Circuits have read the statutory text under consideration here differently in immigration cases and criminal cases. *Compare Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 910-18 (9th Cir. 2004) (adopting Federal Felony Approach in immigration case), *and Aguirre v. INS*, 79 F.3d 315, 317-18 (2d Cir. 1996) (same) *with United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339-41 (9th Cir. 2000) (adopting

B. Under the Background Presumption of *Jerome v. United States*, 318 U.S. 101, 104 (1943), It Must Be Assumed, Absent a "Plain Indication to the Contrary," that Congress Intended to Adopt the Federal Felony Approach, Not the State Felony Approach.

Under the Federal Felony Approach, a simple possession offense will qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) – or not – irrespective of whether it is labeled or punished as a felony under the law of the particular State in which the conviction is sustained. In contrast, under the State Felony Approach, whether a simple possession offense qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) will depend on how the particular State of conviction has characterized the offense conduct; hence, the same offense may or may not be an aggravated felony, depending on the State in which the conviction is sustained. As such, the interpretive question presented by this case must be informed by the long-standing background presumption that

> in the absence of a plain indication to the contrary, [ ] Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is

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State Felony Approach in Sentencing Guidelines case), *cert. denied*, 531 U.S. 1102 (2001), *and United States v. Pornes-Garcia*, 17 F.3d 142, 145-48 (2d Cir.) (same), *cert. denied*, 528 U.S. 880 (1999). Since the Second and Ninth Circuits' cases were decided, however, this Court has conclusively rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases," *Clark v. Martinez*, 543 U.S. 371, 386 (2005), and has held instead that "we must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (citation omitted). The Court should, therefore, accord the relevant statutory language the same meaning both in this case and in *Lopez v. Gonzales*, No. 05-547.

> nationwide and at times on the fact that the federal program would be impaired if state law were to control.

Jerome v. United States, 318 U.S. 101, 104 (1943) (citations omitted).

This Court has repeatedly applied the *Jerome* presumption in both criminal and civil cases, and in contexts closely analogous to that presented here.[5] Indeed, *Jerome* itself is very similar to the instant case. At issue in *Jerome* was the portion of the Bank Robbery Act providing that it was a crime to "enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building or part thereof, so used, any felony or larceny." *See Jerome*, 318 U.S. at 101-02. The particular question was whether the utterance of a forged security – a felony under Vermont law, but not under any federal statute – could qualify as the "any felony" under this statute. *See id.* at 102. Noting that it "must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making

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[5] *See, e.g.*, *Taylor v. United States*, 495 U.S. 575, 591-92 (1990) (declining to read the word "burglary" in 18 U.S.C. § 924(e) as encompassing any offense labeled by a State as "burglary," and instead adopting a "uniform definition independent of the labels employed by the various States' criminal codes"); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-44 (1989) (declining to interpret the term "domicile" in the Indian Child Welfare Act as turning on state law); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-20 (1983) (declining to interpret federal firearms disability provisions as turning on the vagaries of state law pertaining to expunction of convictions), *superseded by statute*, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101(5), 101 Stat. 449, 450 (1986); *United States v. Turley*, 352 U.S. 408, 411 (1957) (declining, in context of National Motor Vehicle Theft Act, to interpret the word "stolen" in accordance with definition of statutory larceny in the State where the taking occurred and instead adopting a uniform national definition).

the application of the federal act dependent on state law," *id.* at 104, and finding no such indication, the Court held that the term "any felony" did not incorporate felonies under state law. *See id.* at 104 & 108.

Because the State Felony Approach makes the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(B) dependent upon state law (particularly whether the State at issue labels and punishes simple possession of a controlled substance as a felony), under *Jerome* and its progeny, Congress would have had to plainly indicate its intent to adopt the State Felony Approach. Congress, however, gave no such "plain indication" of its intent to adopt the State Felony Approach. To the contrary, as will be demonstrated below, the text and history of the provisions at issue demonstrate that Congress intended to adopt the Federal Felony Approach.

C. The Text and Structure of the Statutory Provisions at Issue Here Support the Federal Felony Approach.

As relevant here, the term "aggravated felony" means "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). Because the term "illicit trafficking" is not defined, it should be given its ordinary or natural meaning. *See, e.g.*, *Leocal*, 543 U.S. at 9 ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)).

The ordinary and natural meaning of the word "trafficking" is "the trading or dealing of goods." *Matter of Davis*, 20 I. & N. Dec. 536, 541, 1992 WL 443920 (BIA 1992) (citing definitions of "traffic" and "trafficking" found in BLACK'S LAW DICTIONARY 1340 (5th ed. 1979)). "[This] specific reading of the term trafficking comports well with the legal and everyday usages of that term." *Kuhali v. Reno*, 266 F.3d 93, 108 (2d Cir. 2001) (citing the definition of "traffic" found at WEBSTER'S NEW COLLEGIATE DICTIONARY 1229). "[I]llicit trafficking in a controlled substance" is, therefore, in ordinary and natural (as well as legal) usage, "the unlawful trading or dealing of any controlled substance." *Davis*, 20 I. & N. Dec. at 541 (citation omitted). "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.'" *Id.* (footnote omitted).

Although the simple possession of a controlled substance does not fit within the legal or everyday meaning of the phrase "illicit trafficking in a controlled substance," there remains the matter of the appended phrase "including a drug trafficking crime (as defined in section 924(c) of Title 18)." The meaning of the "including" phrase in § 1101(a)(43)(B) should, however, be informed – and limited – by what precedes it, namely, the "illicit trafficking" phrase.

In *Young v. United States*, 315 U.S. 257 (1942), the Court applied this principle to a similar question of statutory interpretation. At issue in *Young* was the provision in

the Harrison Anti-Narcotic Act that imposed a records-keeping requirement upon "any manufacturer, producer, compounder, or vendor (including dispensing physicians) of [various opiate-containing preparations and remedies]." In that case, a physician was convicted under this provision for giving such preparations and remedies to patients whom he personally attended without keeping any records thereof. The Court, however, read the phrase "including dispensing physicians" as informed and limited by the words that preceded it and held that, as so limited, the statutory phrase did not apply to a physician (like Dr. Young) who administered such preparations to patients whom he personally attended. *See id.* at 259-60.

Under the interpretive principle demonstrated by *Young*, it is arguable that no drug offense, whether state or federal, may be considered an "aggravated felony" under § 1101(a)(43)(B) unless it fits within the common definition of "illicit trafficking in a controlled substance." *But see Gerbier v. Holmes*, 280 F.3d 297, 307-08 n.8 (3d Cir. 2001) (observing that "there is some intuitive appeal to th[is] argument," but ultimately rejecting it). Under this approach, no simple possession offense, either state or federal, could ever qualify as an "aggravated felony" under § 1101(a)(43)(B).

But even if not limited in this fashion by the antecedent phrase "illicit trafficking in a controlled substance," the phrase "drug trafficking crime (as defined in section 924(c) of Title 18)" in § 1101(a)(43)(B) is still better read in accordance with the Federal Felony Approach. First, the Federal Felony Approach is a much better fit with

the ordinary and natural meaning of "drug trafficking" – namely,"trading and dealing" in narcotics, or activity of a "business or merchant nature,"*Davis*, 20 I. & N. Dec. at 541 – than the State Felony Approach. This is so because, with the exception of the recidivist possessor provisions of 21 U.S.C. § 844, the offenses punished as felonies under the three federal acts listed in § 924(c)(2) all fit within the ordinary and natural understanding of "drug trafficking";[6] whereas the State Felony Approach sweeps in ***all***

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[6]At first blush, it would appear that there are three additional exceptions to this generalization. The Controlled Substances Act punishes as a felony the simple possession of more than five grams of cocaine base (also known as "crack cocaine"), as well as the simple possession of flunitrazepam (also known as "Rohypnol"). *See* 21 U.S.C. § 844(a). And the Controlled Substances Import and Export Act punishes as a felony the possession of controlled substances on board any vessel or aircraft or other vehicle arriving in or departing from the United States. *See* 21 U.S.C. § 955.

An examination of the history behind these provisions, however, shows that Congress viewed these offenses as surrogates for more traditional trafficking-type offenses. For example, the legislative history rejecting the Sentencing Commission's proposed alteration of the 100-to-1 ratio between powder cocaine and cocaine base/crack cocaine makes clear that Congress viewed simple possession of more than five grams of crack cocaine as tantamount to trafficking. *See* H.R. Rep. 104-272, at 2-3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 336 (noting that "the possession of even relatively small amounts of crack is frequently inseparable from the trafficking of crack," that "the unique nature of the crack cocaine trafficking trade [ ] often entails trafficking in much smaller quantities of crack cocaine than with powder cocaine," and that "[w]hile 21 U.S.C. § 844 is a possession offense, it presumes that an offender who possesses 5 grams of crack generally possesses it with the intent to distribute").

Likewise, the legislative history behind the felony flunitrazepam proscription indicates that Congress was, first and foremost, concerned not about simple possession of this drug *per se*, but rather about the (involuntary) distribution of this "date rape" drug to unwitting victims for purposes of rape or sexual assault. The increased penalty for simple possession of flunitrazepam was passed as § 2(c) of the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, 110 Stat. 3807 (1996),

state felony simple possession offenses, in broad contravention of that ordinary and natural meaning.

Additionally, it is highly significant that § 1101(a)(43)(B) no longer refers just to the definition of "drug trafficking crime" found in § 924(c)(2) (as it once did), but rather now refers more globally to the definition of "drug trafficking crime" contained in ***all*** of § 924(c).[7] As such, the phrase "drug trafficking crime (as defined in section 924(c) of Title 18)" incorporates not just the definition found in § 924(c)(2), but also the limitation (found in § 924(c)(1)(A)) that it must be a "drug trafficking crime" "for which the person may be prosecuted in a court of the United States," 18 U.S.C. § 924(c)(1)(A)

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whose avowed purpose was "to combat drug-facilitated crimes of violence, including sexual assaults." *Id.*, intro. comment., 110 Stat. at 3807.

Finally, the felony possession proscription contained in 21 U.S.C. § 955 was viewed as being merely part and parcel of a broader effort to control the import and export of controlled substances into and from the United States (quintessential "trafficking"), in part to comply with the United States' treaty obligations under the Single Convention on Narcotic Drugs of 1961. *See* H.R. Rep. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4572 & 4637-39; *see also United States v. Feld*, 514 F. Supp. 283, 288 (E.D.N.Y. 1981) ("It is clear that 21 U.S.C. [§] * * * 955 [is] among the penal provisions that the United States has adopted to effectuate its treaty obligations under the Single Convention.") (citations omitted).

[7]In 1994, Congress specifically amended § 1101(a)(43)(B) to refer more generally to "section 924(c)," rather than "section 924(c)(2)," as § 1101(a)(43)(B) had read before. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320-21 (1994).

– *i.e.*, a ***federal*** crime.[8] Read together, these two provisions mean that a "drug trafficking crime (as defined in section 924(c) of Title 18)" must be a ***federal felony***.[9]

In this regard, it is also significant that, for purposes of the substantive prohibition to which § 924(c)(2) is attached – namely, the prohibition on using, carrying, or possessing a firearm during and in relation to any crime of violence or drug trafficking crime, *see* 18 U.S.C. § 924(c)(1)(A) – the lower courts have uniformly held that the predicate "drug trafficking crime" must be one that ***federal law punishes as a felony***; and that simple possession of a controlled substance, unless punished as a felony

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[8]In interpreting a related provision, courts have adopted similar reasoning. Section 924(h) of Title 18 punishes anyone who knowingly transfers a firearm, knowing that the firearm will be used to commit a crime of violence (as defined in § 924(c)(3)) or a drug trafficking crime (as defined in § 924(c)(2)). On its face, § 924(h) does not appear to limit the predicate "crime of violence" or "drug trafficking crime" to only federal crimes. Nevertheless, in interpreting § 924(h), courts have held that the predicate "crime of violence" cannot be a state offense, but rather must be a federal offense. *See, e.g.*, *United States v. McLemore*, 28 F.3d 1160, 1162-65 (11th Cir. 1994); *United States v. Acosta*, 124 F. Supp. 2d 631, 634-38 (E.D. Wis. 2000).

As part of their reasoning, these courts have concluded that the fact that "the definition of 'crime of violence' contained in section 924(c)(3) includes a reference to the federal limitation contained in section 924(c)(1)" makes it at least equally plausible that Congress intended to limit § 924(h)'s scope to only ***federal*** predicate felonies. *McLemore*, 28 F.3d at 1162-63; *accord Acosta*, 124 F. Supp. 2d at 634. A similar conclusion is even more strongly warranted in this case, given § 1101(a)(43)(B)'s explicit reference to ***all*** of § 924(c) – including, of course, "the federal limitation contained in section 924(c)(1)."

[9]Of course, under the last paragraph of 8 U.S.C. § 1101(a)(43), state law analogues of these federal felony offenses are also included in the definition of "aggravated felony." That fact, however, does not speak to how the phrase "drug trafficking crime (as defined in [§] 924(c) of Title 18)" should be construed.

under federal law, does not qualify.[10] And, indeed, the Government has, in a previous case before this Court, all but conceded this premise. *See* Brief for the United States in Opposition at 10-12, *Price v. United States*, 537 U.S. 1152 (2003) (No. 01-10940) [hereinafter cited as "BIO"]. In *Price*, the issue was whether, for purposes of a prosecution under 18 U.S.C. § 924(c)(1), the Fifth Circuit had incorrectly characterized the defendant's federal conviction for simple possession of cocaine base as a felony based on prior drug possession convictions, where the requisite enhancement notice had not been given pursuant to 21 U.S.C. § 851. The petitioner argued that, "given the [G]overnment's failure to provide the notice required by 21 U.S.C. 851(a), his drug possession offense could not carry a sentence of more than one year and therefore could not serve as a predicate 'drug trafficking crime' under Section 924(c)." BIO 10

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[10] *See, e.g.*, *United States v. Bradley*, 381 F.3d 641, 647-48 n.5 (7th Cir. 2004); *United States v. Smith*, 20 Fed. Appx. 258, 269 (6th Cir. 2001) (unpublished) (after finding evidence insufficient to support any drug charges besides simple possession of cocaine, court also reversed conviction under § 924(c)(1) because "[defendant's] conviction for cocaine possession is a misdemeanor offense, and as such, cannot serve as the underlying predicate offense for the § 924(c) charge"); *United States v. Garnett*, 243 F.3d 824, 829 (4th Cir. 2001) ("possession of less than five grams of cocaine base constitutes a misdemeanor only and cannot serve * * * as 'a drug trafficking offense,' for purposes of 18 U.S.C. § 924(c)(1)") & *id*. at 830 ("hold[ing] that purchase, *i.e.*, possession, of a ***felony*** amount of cocaine base in violation of 21 U.S.C. § 844, constitutes a 'drug trafficking crime' for purposes of section 924(c)") (emphasis in original); *United States v. White*, 969 F.2d 681, 684 (8th Cir. 1992) (noting that, if defendant prevailed on his claim – namely, that the evidence was sufficient only to support a charge of simple possession, rather than possession with intent to distribute – "his § 924(c)(1) conviction would be reversed because a simple possession offense is not a predicate 'drug trafficking crime'").

(footnote omitted). The Government "agree[d] with petitioner that, in the absence of proper notice under 21 U.S.C. 851(a), the drug possession offense did not qualify as a felony for purposes of Section 924(c)." BIO 10-11. The Government noted that

> a drug possession offense is punishable as a felony under the Controlled Substances Act by virtue of the defendant's recidivism only if the government has filed a notice under 21 U.S.C. 851(a). Because no such notice was filed in this case, the court of appeals erred in concluding that petitioner's drug possession offense qualified as a predicate felony under Section 924(c).

BIO 12.

Underlying the Government's concessions in *Price* was its recognition that, for purposes of the crime described in 18 U.S.C. § 924(c)(1)(A), the crime of simple possession of a controlled substance is a qualifying "drug trafficking crime" ***only*** when that crime is punishable as a felony under federal law. And the Court appeared to agree with that proposition, for it granted certiorari, vacated the judgment below, and remanded to the Court of Appeals for further consideration in light of *United States v LaBonte*, 520 U.S. 751, 759-60 (1997), "and the Solicitor General's acknowledgment that the Court of Appeals 'erred in concluding that petitioner's drug possession offense qualified as a predicate felony' under 18 U.S.C. § 924(c) in the absence of notice under 21 U.S.C. § 851(a)." *Price*, 537 U.S. at 1152 (citation to Brief in Opposition omitted).[11]

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[11]The dissenters in *Price* likewise appeared to agree with this proposition. Justice Scalia dissented from the Court's GVR order because he believed that the jury had correctly found, and that the evidence clearly showed, that petitioner had used and carried the firearm in question during and in relation to the federal felony of possession

The ordinary meaning of the phrase "any felony punishable under the Controlled Substances Act" in 18 U.S.C. § 924(c)(2) likewise supports the Federal Felony Approach. The phrase "punishable under the Controlled Substances Act" modifies and informs the meaning of "any felony." "Punishable" means "giving rise to a specified punishment." BLACK'S LAW DICTIONARY 1269 (8th ed. 2004). A "felony punishable under the Controlled Substances Act" thus means a felony offense that "giv[es] rise to a specified punishment" "under the Controlled Substances Act." The ordinary and plain meaning of § 924(c)(2) is therefore that an offense qualifies as a "drug trafficking crime" under § 924(c) only if it "giv[es] rise to a specified punishment" – a sentence of imprisonment in excess of one year, that is, a "felony" sentence – ***under the specified federal laws***.[12] Yet, as has been noted, simple possession of less than one gram of cocaine is not punishable in excess of one year under the Controlled Substances Act. *See* 21 U.S.C. § 844.

This interpretation of the phrase "any felony punishable under the Controlled

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of more than five grams of cocaine base. *See Price*, 537 U.S. at 1157-58 (Scalia, J., dissenting); *see also id.* at 1158 (Kennedy, J., dissenting) (agreeing with Justice Scalia's dissent).

[12]*Cf. Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 281 (1992) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he statute [18 U.S.C. § 1961(1)] defines 'racketeering activity' to include 'any offense involving * * * fraud in the sale of securities * * * punishable under any law of the United States.' * * * '[A]ny offense . . . punishable under the laws of the United States' presumably means that Congress intended to refer to the federal securities laws and not common-law tort actions for fraud.").

Substances Act" in § 924(c)(2) is strongly supported by the way Congress used the phrase "punishable under" in another section of the very same statute, passed in the same Act of Congress as the current version of § 924(c)(2). In 18 U.S.C. § 924(g) (originally enacted as 18 U.S.C. § 924(f) by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6211, 102 Stat. 4181, 4359-60 (1988)), Congress has provided as follows:

> (g) Whoever, with the intent to engage in conduct which –
>
> (1) constitutes an offense listed in section 1961(1),
>
> (2) ***is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),***
>
> (3) ***violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))),*** or
>
> (4) constitutes a crime of violence (as defined in subsection (c)(3)),
>
> travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

18 U.S.C. § 924(g) (emphasis added).

The inclusion of subsection (3) in § 924(g), by the same Congress that enacted the present version of § 924(c)(2), clearly indicates that Congress did not intend for the

phrase "punishable under the Controlled Substances Act" to refer to state-law offenses. The inference arising from the difference between § 924(c)(2) and § 924(g) is especially strong given that these provisions were enacted by the same Congress in consecutive sections of the same Act. *See, e.g.*, *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (referring to "the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted") (citing *Field v. Mans*, 516 U.S. 59, 75 (1995)).

And, there are other statutory provisions that are structured similarly to § 924(g). For example, in the same statute at issue here, § 924(k) punishes anyone who smuggles or brings into the United States (or attempts to do so) a firearm

> with intent to engage in or promote conduct that –
>
> > (1) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); [or]
> >
> > (2) violates any State law relating to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
>
> * * * *

18 U.S.C. § 924(k). *See also, e.g.*, 18 U.S.C. § 3559(c)(2)(H)(i) & (ii) (for purposes of the federal "three strikes" statute, defining the term "serious drug offense" as "(i) an

offense that is ***punishable under*** section 401(b)(1)(A) or 408 of ***the Controlled Substances Act*** * * *; ***or*** (ii) an ***offense under State law*** that, had the offense been prosecuted in a court of the United States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act * * * *") (emphasis added).

Clearly, in these statutes, Congress used the phrase "punishable under" to include only federal offenses and not state offenses punishable under an analogous state law. Otherwise, Congress would not have added the separate clauses that specified analogous state drug laws. Notably, however, in 18 U.S.C. § 924(c)(2), Congress did not include such a separate clause for analogous state felony drug crimes. In other words, "Congress knew how to impose * * * liability [on the basis of state-law offenses] when it chose to do so," *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994), but it did not choose to do so in § 924(c)(2). That is strong evidence that Congress did not intend for state drug offenses that are felonies under state law but misdemeanors under federal law to fall within the ambit of § 924(c)(2). In sum, the fact that "any felony" is modified by the phrase "punishable under the Controlled Substances Act" indicates that Congress intended "any felony" to include only offenses punishable as federal felonies under federal law and not state felonies that are concurrently "punishable" as misdemeanors under federal penal laws.

For all the reasons discussed above, the Federal Felony Approach is a much better reading of the statutory provisions at issue here than the State Felony Approach.

Some courts have concluded otherwise, however, relying principally on 21 U.S.C. § 802(13). These courts reason as follows: the phrase "any felony punishable under [the listed federal statutes]" incorporates the definition of "felony" in 21 U.S.C. § 802(13), namely: "any Federal or State offense classified by applicable Federal or State law as a felony." And, these courts reason, "[s]ection 802(13)'s explicit reliance on state classifications represents a Congressional choice to include within the category of 'felony' offenses under [the listed federal statutes] those crimes deemed serious enough by states to warrant felony treatment within their jurisdictions." *Jenkins v. INS*, 32 F.3d 11, 14 (2d Cir. 1994).[13]

These courts' reliance on § 802(13) is misplaced, for several reasons. First, as Judge Canby has aptly observed, "the definition in 21 U.S.C. § 802(13) is utterly irrelevant to our purpose," because

> [t]his definition [ ] refers to the meaning of "felony" only "[a]s used in this subchapter [*i.e.*, Subchapter I of Title 21, 21 U.S.C. §§ 801-904]." We are not defining "felony" as used in this subchapter, or any subchapter, of Title 21. We are defining felony as used in 18 U.S.C. § 924(c)(2).

Ibarra-Galindo, 206 F.3d at 1343 (Canby, J., dissenting); *see also United States v. Palacios-Suarez*, 418 F.3d 692, 698 (6th Cir. 2005) (making same point); *Peralta-*

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[13] *See also, e.g.*, *Lopez v. Gonzales*, 417 F.3d 934, 937 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1651 (2006); *United States v. Wilson*, 316 F.3d 506, 512-13 (4th Cir.), *cert. denied*, 538 U.S. 1025 (2003); *United States v. Simon*, 168 F.3d 1271, 1272 (11th Cir.), *cert. denied*, 528 U.S. 844 (1999); *United States v. Restrepo-Aguilar*, 74 F.3d 361, 364-65 (1st Cir. 1996).

Espinoza, 413 F. Supp. 2d at 977 (same); *Matter of L– G–*, 21 I. & N. Dec. 89, 98, 1995 WL 582051 (BIA 1995) (same).

Furthermore,

> § 802(13) does not define any substantive offense under the Controlled Substances Act. Rather, § 802(13) defines "felony" for purposes of sentencing enhancements for the substantive crimes set forth in [Title] 21, *see, e.g.*, 21 U.S.C. § 841(b)(1) (1999) (raising the sentence for an 841(b)(1) conviction if the violation occurs "after a prior conviction for a felony drug offense"), but we are not defining "felony" for purposes of sentencing enhancements. We are defining "felony" for purposes of substantive drug crimes.

Gerbier, 280 F.3d at 309; *see also id.* at 309-10; *see also Gonzales-Gomez v. Achim*, 441 F.3d 532, 534 (7th Cir. 2006) (making same point); *Peralta-Espinoza*, 413 F. Supp. 2d at 977 (same); *L– G–* , 21 I. & N. Dec. at 98 (same).

Put another way, "[t]he fact that 'felony' is defined [in § 802(13)] to include a state felony doesn't imply, however, that a state felony is ***punishable*** under the Controlled Substances Act * * * * The Controlled Substances Act does not purport to punish state drug felonies; rather, it indicates that a state felony conviction can be used to enhance the federal sentence of a defendant convicted of violating the Act." *Gonzales-Gomez*, 441 F.3d at 534 (emphasis in original). For these reasons, § 802(13) offers no support for the State Felony Approach.

Additionally, in the particular context of the Sentencing Guidelines, some courts have found support for the State Felony Approach in the commentary to USSG § 2L1.2,

which defines the term "felony" as "any federal, ***state***, or local offense punishable by imprisonment for a term exceeding one year," USSG § 2L1.2, comment. (n.2) (emphasis added). *See, e.g.*, *Ibarra-Galindo*, 206 F.3d at 1339-40; *see also Peralta-Espinoza*, 413 F. Supp. 2d at 976 (collecting cases). As the Sixth Circuit has observed,"[r]eliance on this definition is misplaced, however, because the commentary specifically states that the definition of a 'felony' applies '[f]or purposes of subsection (b)(1)(A), (B), and (D).' Therefore, the definition of the term 'felony' does not have any bearing on the term 'aggravated felony' in subsection (b)(1)(C) of § 2L1.2." *Palacios-Suarez*, 418 F.3d at 698 (citation omitted). Indeed, if anything, under the principle of *expressio unius est exclusio alterius*, "[t]he Commission's omission of § 2L1.2(b)(1)(C) from this note actually supports the [ ] [Federal] [F]elony [A]pproach." *Peralta-Espinoza*, 413 F. Supp. 2d at 977 (footnote and citations omitted).

In sum, "[b]ecause common sense rebels at the thought of classifying bare possession of a tiny amount of narcotics as a drug trafficking crime, [this Court] should not adopt that interpretation unless the statutory language compels [the Court] to conclude that Congress intended such a startling result." *Ibarra-Galindo*, 206 F.3d at 1341 (Canby, J., dissenting). But "[t]he statutory language compels no such conclusion." *Id.* (Canby, J., dissenting). Indeed, as set forth above, the statutory language strongly suggests precisely the ***opposite*** conclusion – namely, that Congress intended to adopt the Federal Felony Approach.

In any event, Congress certainly did not give "a plain indication" that it intended to "mak[e] the application of the federal act dependent on state law," *Jerome*, 318 U.S. at 104; and that is sufficient reason, under *Jerome* and its progeny, to presume that Congress intended the Federal Felony Approach rather than the State Felony Approach. The Fifth Circuit therefore erred in applying the State Felony Approach in deciding Mr. Toledo-Flores's claim.

D. The Statutory and Legislative History of the Relevant Provisions Supports the Federal Felony Approach.

As discussed above, the relevant statutory text plainly supports the Federal Felony Approach, especially when viewed in light of the *Jerome* presumption against making the meaning of a federal statute depend on State law. Lest there remain any doubt, however, both the statutory history and the legislative history of the provisions at issue likewise support the Federal Felony Approach.[14]

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[14]By the term "statutory history," Mr. Toledo-Flores refers only to predecessor versions of the same statutes; by the term "legislative history," he refers to other evidence of the legislative process (*e.g.*, committee reports, floor debates, and preliminary, unenacted bills). Mr. Toledo-Flores recognizes that, for purposes of statutory construction of penal statutes, some Members of the Court have drawn a distinction between the former and the latter. *Compare Almendarez-Torres v. United States*, 523 U.S. 224, 265 (1998) (Scalia, J., dissenting) ("agree[ing] that [ ] statutory history is a legitimate tool of construction") *with United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history") & *id.* at 311 (Thomas, J., concurring in part and concurring in the judgment) (agreeing with this proposition). Because, however, both the statutory history and the legislative history of the provisions at issue in this case support the Federal Felony Approach urged by Mr. Toledo-Flores,

1. History of 18 U.S.C. § 924(c).

As the Sixth Circuit has explained,

> Prior to 1988, § 924(c)(2) defined the term "drug trafficking crime" as "any ***felony violation of Federal law*** involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))." 18 U.S.C. § 924(c)(2) (1982 & Supp. IV 1986) (emphasis added). Thus, the prior statutory language plainly reveals that a "drug trafficking crime" was limited to ***only federal felony offenses***. In the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 6212, 102 Stat. 4181, 4360, Congress amended the subsection into its present-day form, defining the term "drug trafficking crime" as "any felony punishable under" the three enumerated statutes. 18 U.S.C. § 924(c)(2). Congress titled the section of this Act which amended § 924(c)(2) as a "***clarification*** of definition of drug trafficking crimes." * * * Thus, the original understanding of that term as limited to federal felonies was unchanged.

Palacios-Suarez, 418 F.3d at 698-99 (emphasis in original).

As might be expected,"[t]here is nothing in the legislative history to suggest that Congress intended this 'clarification' to dramatically widen the scope of 'drug trafficking crime' to include, for example, simple drug possession punished as a felony by a state." *Cazarez-Gutierrez*, 382 F.3d at 915 (citation omitted). To the contrary,

> Senator Biden, who was Chairman of the Senate Judiciary Committee and a principal drafter and supporter of the Act, explained that the amendment "clarifies the scope of 18 U.S.C. §§ 924(c) and 929(a). Those statutes create offenses of using or carrying a firearm and armor piercing ammunition, respectively, in certain federal crimes including drug trafficking crimes." 134 Cong. Rec. S17360, S17363 (Section

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this case does not require this Court to address to what extent legislative history may be used to clarify the text of a penal statute.

> Analysis of Judiciary Comm. Issues in H.R. 5210 by Sen. Biden). The amendment was intended to make clear that "drug trafficking crime" includes "possession with intent to distribute, or attempt and conspiracy violations." *Id.*; *see also United States v. Contreras*, 895 F.2d 1241, 1244 (9th Cir. 1990) (noting that Congress "labeled the change a 'clarification,' indicating that it had always considered possession with intent to distribute – a felony punishable under the Controlled Substances Act – a drug trafficking crime within the meaning of section 924(c)").

Id.; *see also Gonzales-Gomez*, 372 F. Supp. 2d at 1070-71. "Thus, the changes made in 1988 as now codified in section 924(c) were never intended to broaden the provision's scope to include state offenses, but rather to simply clarify the scope in terms of the ***types*** of federal crimes included." *Gonzales-Gomez*, 372 F. Supp. 2d at 1071 (emphasis in original).

Other courts that have examined this history agree that, "[a]s a clarification, the 1988 amendments [to 18 U.S.C. § 924(c)(2)] did nothing to change the fact that the felony violation must be of federal, not state, law." *Gerbier*, 280 F.3d at 309; *accord Ibarra-Galindo*, 206 F.3d at 1342 (Canby, J., dissenting); *Peralta-Espinoza*, 413 F. Supp. 2d at 977-78. In short, the history of § 924(c) supports the Federal Felony Approach. *Peralta-Espinoza*, 413 F. Supp. 2d at 977.

2. History of 8 U.S.C. § 1101(a)(43).

"The legislative history of 8 U.S.C. § 1101(a)(43) also lends support to the [ ] [Federal] [F]elony [A]pproach." *Id.* As the Third Circuit has explained:

> The "aggravated felony" concept was introduced into the INA

> [Immigration and Nationality Act] by the Anti-Drug Abuse Act of 19[8]8, Pub. L. No. 100-690, 102 Stat. 4181 (1988) ("ADAA"). Section 1101(a)(43) was added to the INA pursuant to § 7342 of the ADAA, which defined the term "aggravated felony" as it pertains to a drug offense as "any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code * * * *"

Gerbier, 280 F.3d at 304 (footnote omitted).[15] Furthermore,

> [a]lthough the discussion of the application of this amendment was sparse, before the Senate began voting on the ADAA, Senator D'Amato, a proponent of the immigration provisions of the ADAA, described the provisions as "focusing on a particularly dangerous class of 'aggravated alien felons,' that is, aliens convicted of murder, and drug and firearms trafficking." 134 Cong. Rec. S17301, S17318. The narrow list of serious crimes targeted, in the context of an Act with a general focus on fighting international drug cartels, suggest that the broadly-worded definition of drug trafficking was not intended to encompass minor state drug offenses with no trafficking element where they are punished as felonies under state law but as misdemeanors under federal law.

Cazarez-Gutierrez, 382 F.3d at 915-16; *see also Gonzales-Gomez*, 372 F. Supp. 2d at 1071 (drawing same conclusion).

A question arose, however, as to whether this definition of "aggravated felony" encompassed state crimes that were analogues of those described in the federal statutes enumerated in § 924(c)(2), or whether, rather, the definition was limited only to convictions obtained under the listed federal statutes. In *Matter of Barrett*, 20 I. & N.

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[15]Of course, as noted above, § 6212 of the ADAA at the same time amended the text of § 924(c)(2) to its present form, namely, "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." *See also Gerbier*, 280 F.3d at 304.

Dec. 171, 1990 WL 385754 (BIA 1990), the Board of Immigration Appeals ("BIA") adopted the former approach but, along the way, clarified its view that, in order to qualify as "aggravated felonies," state offenses must be analogues of ***federal felony offenses*** under the listed statutes. *See Barrett*, 20 I. & N. Dec. at 175 ("As such, we find that the definition of 'drug trafficking crime' at 18 U.S.C. § 924(c)(2), as incorporated into the Immigration and Nationality Act by section 101(a)(43) of the Act, includes a state conviction sufficiently analogous to a ***felony offense under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act***.") (emphasis added).

Not long after the *Barrett* decision, Congress, in the Immigration Act of 1990, amended the definition of "aggravated felony" to include "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in section 924(c)(2) of Title 18, United States Code," Pub. L. No. 101-649, § 501(a)(2), 104 Stat. 4978, 5048 (1990), and provided that the term "aggravated felony" "applies to offenses described in the previous sentence whether in violation of Federal or State law." *Id.* at § 501(a)(5), 104 Stat. at 5048. "It is clear from the House Judiciary Committee Report on the bill that Congress intended to codify *Barrett* with this amendment." *Cazarez-Gutierrez*, 382 F.3d at 916. Particularly, that Committee Report stated:

> Current law clearly renders an alien convicted of a Federal drug

> trafficking offense an aggravated felon. It has been less clear whether a state drug trafficking conviction brings that same result, although the Board of Immigration Appeals in *Matter of Barrett* (March 6, 1990) has recently ruled that it does. Because the Committee concurs with the recent decision of the Board of Immigration Appeals and wishes to end further litigation on this issue, section 1501 of H.R. 5269 specifies that drug trafficking (and firearms/destructive device trafficking) is an aggravated felony whether or not the conviction occurred in state or Federal court.

H.R. Rep. 101-681, pt. 1, at 147 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6553.

To be sure, from this report it appears that Congress was primarily concerned with codifying *Barrett*'s holding that state, as well as federal, offenses could qualify as "aggravated felonies"; the report does not speak directly to *Barrett*'s ***other*** holding – namely, that "drug trafficking crimes" must be federal felonies or their state-law analogues. *But see Palacios-Suarez*, 418 F.3d at 699 ("The language of the report clearly reveals that Congress embraced the BIA's 'hypothetical federal felony' approach with regard to the term 'aggravated felony.'"). Nevertheless, the report shows that Congress was aware of the *Barrett* decision, and – significantly – expressed no disapproval of that other holding. "It is [thus] clear that the approach of the Board in *Barrett* met with Congress's approval." *Ibarra-Galindo*, 206 F.3d at 1344 (Canby, J., dissenting).

Along these lines, it is also significant that despite the BIA's adherence to the Federal Felony Approach in its 1992 decision in *Davis*, 20 I. & N. Dec. at 542-44, and its 1995 decision in *L–G–*, 21 I. & N. Dec. at 94-96, and despite major overhauls of the

INA in 1996,

> Congress made no changes to the aggravated felony provisions that disputed or called into question those rulings. It is an established principle of statutory construction that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978). The presumption is particularly appropriate where [as in the 1996 immigration legislation] Congress exhibited both a detailed knowledge of the incorporated provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation. *Id.* at 581, 98 S. Ct. 866. Furthermore, Congress is not presumed to change well-established legal precedent by silence. *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14, 111 S. Ct. 1539, 113 L. Ed. 2d 675 (1991).

Gonzales-Gomez, 372 F. Supp. 2d at 1072. The fact that Congress specifically amended the INA to overrule certain BIA rulings, yet declined to amend the portion of the "aggravated felony" definition here at issue so as to overrule the BIA's rulings in *Davis* and *L–G–* ,[16] is evidence that "Congress did not object to the BIA's reasoning in [these cases]." *Id.* at 1073 (citation omitted); *see also id.* at 1072-73; *Cazarez-Gutierrez*, 382 F.3d at 917 (drawing same conclusion); *Matter of Yanez-Garcia*, 23 I. & N. Dec. 390, 405-06, 2002 WL 993589 (BIA 2002) (Rosenberg, Board Member, concurring in part and dissenting in part) (same).

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[16]Indeed, the one change made to 8 U.S.C. § 1101(a)(43)(B) after 1990 actually cuts ***against*** the State Felony Approach. In 1994, Congress specifically amended § 1101(a)(43)(B) to refer more generally to "section 924(c)" rather than "section 924(c)(2)" as it had read before. *See supra* note 7. As discussed above, this amendment supports the Federal Felony Approach. *See id.* and accompanying text.

In sum, "the legislative history of § 1101(a)(43) confirms the interpretation that Congress did not intend for state felony convictions (not involving any element of drug trafficking) to qualify as an 'aggravated felony' under § 1101(a)(43)(B) if the offense would be punishable only as federal misdemeanor under the CSA." *Palacios-Suarez*, 418 F.3d at 700.

3. Conclusion.

The statutory and legislative history of the provisions here at issue makes clear that the Federal Felony Approach "is the proper interpretation of an 'aggravated felony' under the INA." *Id.* At a minimum, neither the text and structure of these provisions nor their history "plain[ly] indicat[es]," *Jerome*, 318 U.S. at 104, that Congress intended the application of § 1101(a)(43)(B) to vary depending upon how the particular State of conviction punished the conduct at issue. Under *Jerome* and its progeny, it must therefore be presumed that Congress intended the Federal Felony Approach rather than the State Felony Approach.

E. Even If the Text, Structure, and History of the Statutory Provisions at Issue Here Did Not Clearly Support the Federal Felony Approach, That Approach Would Nonetheless Be Required by Application of the Rule of Lenity.

As set forth above, the text, structure, and history of the statutory provisions at issue here clearly indicate that Congress intended to adopt the Federal Felony Approach rather than the State Felony Approach applied by the Fifth Circuit in this case. Whether

or not one agrees with this position, however, one thing is certainly clear – the text, structure, and history of the statutes in question do ***not*** establish that the State Felony Approach is unambiguously correct. That being the case (and to paraphrase Justice Scalia), "[e]ven if the [Court] does not consider the issue to be as clear as [Mr. Toledo-Flores] do[es], [it] must at least acknowledge * * * that it is eminently debatable – and that is enough, under the rule of lenity, to require finding for [Mr. Toledo-Flores] here." *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting).

"In these circumstances – where text, structure, and history fail to establish that the Government's position is unambiguously correct – [this Court] appl[ies] the rule of lenity and resolve[s] the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994) (citing *United States v. Bass*, 404 U.S. 336, 347-49 (1971)); *see also Ladner v. United States*, 358 U.S. 169, 177 (1958). Therefore, should any doubt remain as to whether Congress intended to adopt the Federal Felony Approach, the rule of lenity nevertheless compels that conclusion. *See, e.g.*, *Palacios-Suarez*, 418 F.3d at 702 (Nelson, J., concurring) (opining that, because relevant language could be read to support either approach, rule of lenity required adoption of the Federal Felony Approach); *Ibarra-Galindo*, 206 F.3d at 1344-45 (Canby, J., dissenting) ("Even if the language and history of those statutes did not militate toward [adoption of the Federal Felony Approach], they would certainly give rise to uncertainty about the proper construction. In that event, we should follow the rule of lenity and adopt the

construction that is most favorable to the defendant.") (footnote omitted); *Peralta-Espinoza*, 413 F. Supp. 2d at 980 ("Finally, to the extent there remained any doubt, the rule of lenity directed me to apply the [ ] [Federal] [F]elony [A]pproach.").[17]

F. The Federal Felony Approach Furthers the Well-Established Interest in Uniform Nationwide Application of Both Criminal Laws and Immigration Laws, and Also Avoids the Troubling Constitutional Questions that the State Felony Approach Raises.

Finally, the Federal Felony Approach comports with the policy of "desirability of uniformity in application" of federal criminal laws that underlies the *Jerome* presumption invoked here. *Jerome*, 318 U.S. at 104. Indeed, this Court has previously relied on that policy to reject an interpretation of a federal statute that would have made the applicability of a federal sentencing enhancement turn on a State's characterization of a prior offense under that State's own law. *See Taylor*, 495 U.S. at 590-92. At issue in that case was whether "burglary" under the Armed Career Criminal Act (18 U.S.C. § 924(e)) included any offense labeled as "burglary" by the State of conviction. The Court noted that an affirmative answer to that question "would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence

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[17] Adoption of the Federal Felony Approach is also compelled by the immigration counterpart to the rule of lenity, namely, "'the long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)); *see also, e.g.*, *Cazarez-Gutierrez*, 382 F.3d at 918 ("ambiguities in statutes are construed in favor of aliens in removal") (citing *Cardoza-Fonseca*, 480 U.S. at 449, and *INS v. Errico*, 385 U.S. 214, 225 (1966)).

enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'" *Taylor*, 495 U.S. at 590-91. Relying on the presumption in favor of uniform application of federal laws, and against incorporation of disparate State laws, the Court instead answered that question in the negative and held that "'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes." *Id.* at 592.

Congress itself has expressed the view that federal sentencing should uniformly punish those who are guilty of identical conduct. For example, Congress has mandated that, in sentencing federal defendants, federal courts should "consider * * * the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). And, indeed, "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" was one of Congress's chief goals in enacting a system of Sentencing Guidelines. *See* 28 U.S.C. §§ 991(b)(1)(B) & 994(f); *see also United States v. Booker*, 543 U.S. 220, 253 (2005) ("Congress' basic goal in passing the Sentencing [Reform] Act was to move the sentencing system in the direction of increased uniformity.") (citing 28 U.S.C. §§ 991(b)(1)(B) and 994(f)) & *id.* at 246 (referring to "the increased uniformity of sentencing that Congress intended its Guidelines system to achieve"). The strong interest in the uniform application of federal criminal laws is best served by the application of the Federal Felony Approach.

This policy in favor of uniform national application of the criminal laws dovetails with the similar policy in favor of uniform national application of immigration law. *See, e.g.*, *Gerbier*, 280 F.3d at 311-12 (discussing policy in favor of uniform national application of immigration law and concluding that this policy supports adoption of the Federal Felony Approach); *Peralta-Espinoza*, 413 F. Supp. 2d at 979-80 (same); *Gonzales-Gomez*, 372 F. Supp. 2d at 1073-76 (same). And,

> [the Federal Felony Approach] is entirely consistent with and meaningfully effectuates uniformity. To hold otherwise would result in widely disparate consequences for similarly situated aliens based solely on differing state classifications of identical drug offenses. We do not believe that such a result was intended by Congress.

Gonzales-Gomez, 372 F. Supp. 2d at 1075 (quoting *Matter of K–V–D–*, 22 I. & N. Dec. 1163, 1174, 1999 WL 1186808 (BIA 1999); internal quotation marks omitted). Put another way, "widely disparate immigration consequences due to differences in how states punish drug offenses 'cannot be what Congress intended in establishing a "uniform" immigration law.'" *Cazarez-Gutierrez*, 382 F.3d at 918 (quoting *Gerbier*, 280 F.3d at 312).

Indeed, to the extent that "the policy favoring uniformity in the immigration context is rooted in the Constitution," *Gerbier*, 280 F.3d at 311 (citing U.S. CONST. art. I, § 8; further citation omitted), the disparate results occasioned by the State Felony

Approach raise serious constitutional questions.[18] *See generally* Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. Rev. 1696 (1999). And, this Court has long held that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (citation omitted). Thus, "'[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" *United States v. LaFranca*, 282 U.S. 568, 574 (1931) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); other citations of authority omitted). *See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 628-29 (1993) (referring to this rule of statutory construction as a "hoary one" and collecting authorities). The Court can, and should, avoid these nettlesome constitutional questions by adopting the interpretation strongly suggested by the text, structure, and history of the provisions at issue here, namely: the Federal Felony Approach.

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[18]In addition to (at least arguably) impinging upon the requirements of the Naturalization Clause of the Constitution (U.S. CONST. art. I, § 8), the disparate results occasioned by the State Felony Approach also raise grave constitutional questions under the equal protection component of the Due Process Clause of the Fifth Amendment. *See, e.g.*, *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) ("Fundamental fairness dictates that permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").

G. Summary.

In summary, what this Court once said about another statute applies with equal force to 8 U.S.C. § 1101(a)(43)(B):

> Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for [regulating which persons were to be deemed removable (or punishable) by dint of prior narcotics convictions]. [Section 1101(a)(43)(B)] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. It is an Act, therefore, in reference to which it is not only proper, but necessary for [the Court] to assume "in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law." Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.

NLRB v. Hearst Publications, Inc., 322 U.S. 111, 123 (1944) (citations omitted). At the very least, Congress gave no "plain indication," *Jerome*, 318 U.S. at 104, of its intent to make the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(B) dependent upon the vagaries of state law (particularly whether the State at issue labels and punishes simple possession of a controlled substance as a felony). Under *Jerome* and its progeny, it must therefore be presumed that Congress intended to adopt the Federal Felony Approach.

Even if this result were not compelled by statutory construction and the *Jerome* presumption, however, the same result would be compelled by the rule of lenity, as well

as by the strong interest in uniform national application of federal criminal and immigration laws and the principle of constitutional avoidance. Because the Fifth Circuit erroneously applied the State Felony Approach in deciding Mr. Toledo-Flores's case, this Court should reverse the judgment of the Fifth Circuit.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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