No. 11-702

IN THE
Supreme Court of the United States

ADRIAN MONCRIEFFE,
Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL,
Respondent.

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

BRIEF FOR THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Center on the Administration of Criminal Law, New York University School of Law (the "Center")[2] is an organization dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases in state and federal courts throughout the United States.

The Center is particularly concerned with assisting courts in gaining a better understanding of how the criminal justice process works on the ground. In this case, that knowledge is critical. The Fifth Circuit's opinion below suggests that defendants could establish small drug quantity and lack of remuneration during prosecution of their state crimes, but that view is inconsistent with the reality of how these cases are processed. This brief describes that reality to assist the Court's evaluation of the opinion below.

SUMMARY OF ARGUMENT

A review of state marijuana distribution laws demonstrates that the Fifth Circuit's holding in this case

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[1] Letters consenting to the filing of amicus briefs have been filed by the parties with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] New York University School of Law is named here solely to identify the Center's affiliation. The views expressed in this brief should not be regarded as the position of the Law School.

conflicts with the goals of state criminal justice systems, fails to take into account how state drug offenses are prosecuted, and leads to inequalities by jurisdiction.

First, the Fifth Circuit's approach would equate minor state drug offenses with serious federal drug felonies, a position contrary both to this Court's precedents and to the interests and expectations of state criminal justice systems.

Second, the suggestion that defendants in low-level state drug cases could establish small drug quantity and lack of remuneration during prosecution of their state crimes is not consistent with the reality of state drug prosecutions. Defendants charged with such offenses tend to move through the system quickly, with minimal procedural protections, and with plea bargaining or summary proceedings to resolve their cases. Moreover, drug quantity and remuneration are irrelevant to many state distribution laws. Defendants therefore have neither a reason nor an opportunity to develop such evidence in state court prosecutions.

Third, the approach of the Fifth Circuit would lead to different deportation outcomes for different defendants based solely on the particular state in which they were convicted.

ARGUMENT

I. THE FIFTH CIRCUIT EQUATES MINOR STATE DRUG OFFENSES WITH SIGNIFICANT FEDERAL DRUG TRAFFICKING VIOLATIONS, CONTRARY TO THIS COURT'S PRECEDENT AND THE GOALS AND EXPECTATIONS OF STATE CRIMINAL JUSTICE SYSTEMS

The position of the Fifth Circuit is that immigrants convicted under state laws that encompass both conduct punishable under 21 U.S.C. § 841(b)(4) (distribu-

tion of a "small amount" of marijuana for no remuneration, a misdemeanor) and other § 841 conduct (a felony) will be presumed to have committed the felony-level offense for immigration purposes, absent evidence to the contrary. Thus, to the extent that state laws encompass both types of conduct, the Fifth Circuit would essentially treat misdemeanor and felony drug offenders as equivalent for immigration purposes.

That approach is not consistent with *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2585, 2589 (2010), in which this Court declined to categorize petitioner's nontrafficking drug possession offense as a "drug trafficking crime" for purposes of immigration law. Applying the "commonsense" approach of *Lopez* v. *Gonzales*, 549 U.S. 47, 53 (2006), the Court ruled it unreasonable to equate possession of a small amount of a prescription drug with a felony "drug trafficking crime" under federal law. *Carachuri-Rosendo*, 130 S. Ct. at 2585; *see also Lopez*, 549 U.S. at 53 (holding that treating a simple possession offense as illicit trafficking under the immigration laws would be "incoheren[t] with any commonsense conception of 'illicit trafficking,'" which ordinarily refers to "some sort of commercial dealing"). The *Carachuri-Rosendo* Court noted that the conduct in question was punished by 10 days in jail, while federal felonies are punishable by at least one year in prison—and often much longer. *Carachuri-Rosendo*, 130 S. Ct. at 2580, 2585.

The same "commonsense" analysis defeats the government's position here. Possession of up to 50 kilograms (i.e., 50,000 grams) of marijuana with intent to distribute under the applicable federal provision is punishable by up to five years in prison and a $250,000 fine. *See* 21 U.S.C. § 841(b)(1)(D). Distribution of a small amount of marijuana for no remuneration under 21

U.S.C. § 841(b)(4), however, is treated like simple possession under 21 U.S.C. § 844, punishable by no more than one year in prison and a $1000 fine. The federal statutory structure thus clearly distinguishes between the two categories of conduct, and the Fifth Circuit's conflation of them is improper.

State laws that encompass § 841(b)(4) conduct tend to prescribe light punishments, underscoring the disproportionate nature of the Fifth Circuit's approach. Applying felony standards to convictions that the states consider only minor offenses is contrary to the goals and intentions of state criminal justice systems.

Notably, states whose penal codes separately punish non-remunerative distribution of a "small amount" of marijuana[3]—encompassing solely § 841(b)(4) conduct—tend to prescribe minor penalties for these offenses, such as fines and little or no confinement.[4]

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[3] The Board of Immigration Appeals has held that, while there is no fixed quantity that is always considered "a small amount" under § 841(b)(4), the quantity of 30 grams (or a little over an ounce) "serve[s] as a useful guidepost" in considering the issue. *See Matter of Castro Rodriguez*, 25 I. & N. Dec. 698, 703 (BIA 2012). This brief will use 30 grams as a benchmark for a "small amount" under § 841(b)(4).

[4] *See* Cal. Health & Safety Code § 11360(b) (non-remunerative distribution of not more than 28.5 grams of marijuana, punishable by fine of not more than $100); 720 Ill. Comp. Stat. 550/6 ("casual delivery" of cannabis—non-remunerative distribution of less than ten grams—treated as possession, punishable by not more than six months imprisonment, fine not to exceed $1500, or both, *see id.* 550/3(b), 550/4(b); 730 Ill. Comp. Stat. 5/5-4.5-60); N.M. Stat. Ann. § 30-31-22(E) (non-remunerative distribution of "a small amount" of marijuana ("small amount" not defined), punishable by fine of up to $100 and up to fifteen days imprisonment, *see id.* § 30-31-

Moreover, even those state laws that encompass *both* certain § 841(b)(4) conduct *and* certain other § 841 conduct often provide solely for misdemeanor-level punishments. In at least thirteen states and the District of Columbia, such offenses are punishable by no more than one year of incarceration.[5] For some of

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23(B)(1)); N.Y. Penal Law § 221.35 (non-remunerative distribution of two grams or less of marijuana, punishable by up to three months imprisonment); N.C. Gen. Stat. § 90-95(b)(2) (non-remunerative distribution of less than five grams of marijuana, any sentence of imprisonment must be suspended, *see id.* § 90-95(d)(4)); Ohio Rev. Code Ann. § 2925.03(C)(3)(h) (non-remunerative distribution of less than twenty grams of marijuana, punishable by up to $150 fine, *see id.* § 2929.28(A)(2)(a)(v)); Or. Rev. Stat. § 475.860(3)(a) (non-remunerative distribution of less than one ounce of marijuana, punishable by up to one year imprisonment); 35 Pa. Cons. Stat. § 780-113(a)(31), (g) (non-remunerative distribution of up to thirty grams of marijuana, punishable by up to 30 days imprisonment, fine of up to $500, or both); S.D. Codified Laws § 22-42-7 (non-remunerative distribution of less than one-half ounce of marijuana, punishable by not less than fifteen days in county jail); Tex. Health & Safety Code Ann. § 481.120(b)(1) (non-remunerative distribution of one-fourth ounce or less of marijuana, punishable by fine of up to $2000, up to 180 days in jail, or both, *see* Tex. Penal Code Ann. § 12.22).

[5] *See* Alaska Stat. § 11.71.050(a)(1), (b) (punishable by up to one year imprisonment, *see id.* § 12.55.135(a)); Colo. Rev. Stat. § 18-18-406 (subject to a fine only, *see id.* § 18-1.3-503(1)); D.C. Code § 48-904.01(a)(2)(B) (punishable by imprisonment for not more than 180 days, fine of not more than $1000, or both); Haw. Rev. Stat. § 712-1248(1)(d), (2) (punishable by up to one year imprisonment, *see id.* § 706-663); Ind. Code § 35-48-4-10(a) (punishable by up to one year imprisonment, *see id.* § 35-50-3-2); Ky. Rev. Stat. Ann. § 218A.1421(2)(a) (punishable by up to one year imprisonment, *see id.* § 532.090(1)); Me. Rev. Stat. tit. 17-A, § 1106(1-A)(D) (punishable by less than one year in county jail, *see id.* § 1252(1)(A), (2)(D)); Mich. Comp. Laws § 333.7410(7) (punishable by up to one year imprisonment); Minn. Stat. §§ 152.027(4)(a),

these offenses, the prescribed punishment is much lower. *See*, Colo. Rev. Stat. § 18-18-406(5) (subject to a fine only, *see id.* § 18-1.3-503(1)); D.C. Code § 48-904.01(a)(2)(B) (punishable by imprisonment for not more than 180 days, fine of not more than $1000, or both); Minn. Stat. §§ 152.027(4)(a), 152.01(16) (punishable by requirement to participate in drug education program); Ohio Rev. Code Ann. § 2925.03(C)(3)(a) (punishable by "community control sanction," unless specified factors suggest incarceration, *see id.* § 2929.13(B)(1)(a)).

In addition, actual state sentences under the applicable provisions are often significantly lower than the maximum allowed. The petitioner in this case, for example, was charged under a Georgia statute that provides for a penalty of one to ten years. Ga. Code Ann. § 16-13-30(j). However, he received only probation under the state First Offender Act, *see id.* § 42-8-62.

Such facts are not unusual. In New York, between 2005 and 2011, there were over 20,000 convictions under New York Penal Law § 221.40, which criminalizes distribution of marijuana (except non-remunerative

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152.01(16) (punishable by requirement to participate in drug education program); N.Y. Penal Law § 221.40 (punishable by up to one year imprisonment, *see id.* § 70.15(1)); N.C. Gen. Stat. §§ 90-95(b)(2), 15A-1340.17 (punishable by 3-8 months imprisonment); Ohio Rev. Code Ann. § 2925.03(C)(3)(a) (punishable by "community control sanction" unless specified factors suggest incarceration, *see id.* § 2929.13(B)(1)(a)); Tenn. Code Ann. § 39-17-418(a)-(c) (punishable by up to 11 months, 29 days imprisonment or fine of up to $2500, or both, *see id.* § 40-35-111(e)(1)); Va. Code Ann. § 18.2-248.1(a)(2) (if lack of remuneration is shown, punishable by confinement in jail for up to 12 months or fine of up to $2500, or both, *see id.* § 18.2-11(a)).

distribution of less than two grams or one marijuana cigarette, which is separately addressed in § 221.35). *See* New York State Division of Criminal Justice Services, *New York State Arrests Disposed by Charge* (Apr. 2012). Conviction under § 221.40 is punishable by a prison term of up to one year. N.Y. Penal Law § 70.15(1). However, of the over 20,000 convictions between 2005 and 2011, about 75 percent resulted in sentences of time served only, probation only, conditional discharge, or fines. *See New York State Arrests Disposed by Charge*. And of the 25 percent of convictions that resulted in incarceration, more than 75 percent were for 30 days or less. *See* New York State Division of Criminal Justice Services, *Prison And Jail Terms Imposed For Convictions From Selected Arrests* (Apr. 2012).[6] Similarly, in Massachusetts, in fiscal year 2009, only 35 percent of defendants convicted of distribution of class D drugs (including marijuana) were incarcerated. *See* Massachusetts Sentencing Commission, *Survey of Sentencing Practices FY 2009*, at 90 (June 2010), *available at* http://www.mass.gov/courts/admin/sentcomm/fy2009survey.pdf. In Missouri, a 2012 Sentencing Commission User Guide recommends probation for typical offenders with no prior felony convictions under an applicable state marijuana distribution law. *See* Missouri Sentencing Advisory Commission, *User Guide 2011-2012*, at 105 (Apr. 2012), *available at* http://www.mosac.mo.gov/file.jsp?id=45394.

As these figures make clear, states often treat defendants convicted of offenses encompassing § 841(b)(4) conduct as minor offenders. Nonetheless, the Fifth

[6] All New York State Division of Criminal Justice Services data on file with author.

Circuit would label these defendants as *prima facie* "aggravated felons" subject to the serious consequence of mandatory deportation unless they can put forward proof as to both lack of remuneration and small drug quantity. Such proof will often be difficult or impossible to obtain, as described below. *See* Part II, *infra*. The position of the Fifth Circuit will thus lead to mandatory deportation in many such cases. This result is wholly inconsistent with the goals and expectations of state criminal justice systems with respect to minor offenders.

II. DEFENDANTS CHARGED WITH LOW-LEVEL STATE MARIJUANA OFFENSES OFTEN HAVE NO OPPORTUNITY OR REASON TO ESTABLISH SMALL QUANTITY OR LACK OF REMUNERATION

Under the Fifth Circuit's holding, immigrants whose state marijuana offenses involve non-remunerative distribution of small amounts of marijuana must prove these facts when they are charged in order to avoid being incorrectly categorized as aggravated felons in later immigration proceedings. But in most states, the prosecution of low-level marijuana offenses provides neither a reason nor an opportunity to establish such facts in the criminal proceedings.[7]

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[7] Nor do most immigrants in removal proceedings have any real opportunity to develop such evidence. Of immigrants whose immigration proceedings were completed in 2010, 57 percent were not represented and 44 percent were detained. *See* Executive Office of Immigration Review, *FY 2010 Statistical Year Book* G1, O1, (Jan. 2011), *available at* www.justice.gov/eoir/statspub/fy10syb.pdf; *see also* Brief of Amici Curiae National Immigrant Justice Center, et al. (discussing obstacles immigrants face in removal proceedings).

Remuneration is irrelevant to applicable marijuana distribution offenses in at least 39 states, as well as in the District of Columbia and Puerto Rico.[8] Drug quantity is irrelevant to applicable marijuana distribution

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[8] *See* Ala. Code § 13A-12-211(a); Alaska Stat. § 11.71.050(a)(1); Ariz. Rev. Stat. Ann. § 13-3405(A)(4); Conn. Gen. Stat. § 21a-277(b); Del. Code Ann. tit. 16, § 4754(1); D.C. Code § 48-904.01(a)(2)(B); Fla. Stat. § 893.13(1)(a); Ga. Code Ann. § 16-13-30(j); Haw. Rev. Stat. § 712-1248(1)(d); Idaho Code Ann. § 37-2732(a)(1)(B); 720 Ill. Comp. Stat. 550/5; Ind. Code Ann. § 35-48-4-10(a); Iowa Code § 124.401(1)(d); Kan. Stat. Ann. § 21-5705(a)(4); Ky. Rev. Stat. Ann. § 218A.1421(2)(a); La. Rev. Stat. Ann. § 40:966(A)(1); Me. Rev. Stat. tit. 17-A, § 1106(1-A)(D); Md. Code Ann., Crim. Law § 5-602; Mass. Gen. Laws ch. 94C, § 32C(a); Miss. Code Ann. § 41-29-139(a)(1); Mo. Rev. Stat. § 195.211; Mont. Code Ann. § 45-9-101(4); Neb. Rev. Stat. § 28-416(1)(a); Nev. Rev. Stat. § 453.321(1); N.H. Rev. Stat. Ann. § 318-B:26(1)(d)(1); N.J. Stat. Ann. § 2C:35-5(a)(1); N.Y. Penal Law §§ 221.40, 221.45 (*see also id.* § 220.00(1) (defining "[s]ell" to include "give or dispose of to another")); N.D. Cent. Code § 19-03.1-23(1)(b); Ohio Rev. Code Ann. § 2925.03(C)(3)(a) (*see also id.* § 3719.01(AA) (defining "[s]ale" to include "transfer, or gift")); Okla. Stat. tit. 63, § 2-401(A)(1); P.R. Laws Ann. tit. 24, § 2401(a); R.I. Gen. Laws § 21-28-4.01(a)(4)(i); S.D. Codified Laws § 22-42-7 (remuneration irrelevant for quantities over one-half ounce); Tenn. Code Ann. §§ 39-17-417(a), -418(a), (b) (*see Tennessee* v. *Copeland*, 983 S.W.2d 703, 708 (Tenn. Crim. App. 1998) (holding that "[m]oney may or may not be involved" in a "casual[] exchange" under § 39-17-418(a)); Tex. Health & Safety Code Ann. § 481.120(a) (remuneration irrelevant for quantities over one-fourth ounce, *see id.* § 481.120(b)); Utah Code Ann. § 58-37-8(1)(a); Vt. Stat. Ann. tit. 18, § 4230(b)(2); Wash. Rev. Code § 69.50.401(1); W. Va. Code § 60A-4-401(a); Wis. Stat. § 961.41(1); Wyo. Stat. Ann. § 35-7-1031(a); *see also* Ark. Code Ann. §§ 5-64-436, -438, -101(7) (although statutory definition of "deliver" suggests application to remunerative transfers only, case law appears to have expanded definition to include some non-remunerative transfers, *see, e.g.*, *Anderson* v. *Arkansas*, 630 S.W.2d 23, 23-24 (Ark. 1982)).

offenses in at least 23 states and in Puerto Rico.[9] State prosecutors charging these crimes have no reason to introduce remuneration or drug quantity evidence to prove the elements of the offense. Defendants have no reason to introduce such evidence to defend against the criminal charges. Nor do state courts have any reason to accommodate defendants wishing to develop such evidence irrelevant to the charge at issue, even if defendants seek to do so. Therefore, there is often no avenue for the issue to come up at all.

Further, any defendant who could collect and present such evidence would generally have no meaningful opportunity to do so for another reason. The offenses at issue here—distribution of a small amount of marijuana for no remuneration—are minor crimes that are often quickly processed and disposed of in state courts, with minimal process and penalties. The routine processing of such charges does not generally allow for detailed development of evidence.

Misdemeanors—a category that includes many of the state offenses at issue here, *see* n.5, *supra*—make

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[9] *See* Ala. Code § 13A-12-211(a); Conn. Gen. Stat. § 21a-277(b); Del. Code Ann. tit. 16, § 4754(1); Fla. Stat. § 893.13(1)(a); Ga. Code Ann. § 16-13-30(j)(1); Haw. Rev. Stat. § 712-1248(1)(d); Idaho Code Ann. § 37-2732(a)(1)(B); La. Rev. Stat. Ann. § 40:966(A)(1); Me. Rev. Stat. tit. 17-A, § 1106(1-A)(D); Md. Code Ann., Crim. Law § 5-602; Mass. Gen. Laws ch. 94C, § 32C(a); Mich. Comp. Laws § 333.7410(7); Mont. Code Ann. § 45-9-101(4); Neb. Rev. Stat. § 28-416(1)(a); Nev. Rev. Stat. § 453.321(1); N.D. Cent. Code § 19-03.1-23(1)(b); Okla. Stat. tit. 63, § 2-401(A)(1); P.R. Laws Ann. tit. 24, § 2401(a); R.I. Gen. Laws § 21-28-4.01(a)(4)(i); S.C. Code Ann. § 44-53-370(a); Utah Code Ann. § 58-37-8(1)(a); Wash. Rev. Code § 69.50.401(1); W. Va. Code § 60A-4-401(a); Wyo. Stat. Ann. § 35-7-1031(a).

up the vast bulk of the criminal docket in state courts. *See* LaFountain, et al., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* 47 (2010), *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx. The pressure to process these high volume cases quickly is strong. *See, e.g.*, Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277, 306-307 (2011).

The limited time available to state public defenders adds to the pressure to process low-level cases quickly.[10] Although many authorities suggest that each public defender's caseload should not exceed 400 misdemeanors annually, *see, e.g.*, American Council of Chief Defenders, *Statement on Caseloads and Workloads* 1, 3 (Aug. 2007), *available at* http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf (citing 1973 recommendations of National Advisory Commission on Criminal Justice Standards and Goals:

[10] While comprehensive national figures on representation by counsel of defendants charged with state misdemeanors are lacking, a 1996 Department of Justice survey of jail inmates indicated that more than half of the inmates charged with misdemeanors had court-appointed counsel, and nearly two-thirds of the remainder were proceeding *pro se*. *See* Harlow, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* tbl. 13 (Nov. 2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf; *see also* Boruchowitz, et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 14-15 (Apr. 2009), *available at* www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808 (describing empirical evidence indicating a large percentage of unrepresented state misdemeanor defendants).

Courts ("NAC Standards")), the evidence suggests that most public defenders far exceed this level. For example, a government study reported that, in 2007, 73 percent of county-based public defender offices exceeded the NAC Standards. Farole & Langton, Bureau of Justice Statistics, *County-based and Local Public Defender Offices, 2007*, at 1 (Sept. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf; *see also* Boruchowitz, et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 20-22 (Apr. 2009), *available at* www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808 (describing overwhelming public defender misdemeanor caseloads in many jurisdictions); Pallasch, *Call to Limit Cases Amuses Public Defenders*, Chi. Sun-Times, July 24, 2006, at 18; Eckholm, *Citing Workload Public Lawyers Reject New Cases*, N.Y. Times, Nov. 9, 2008, at A1; *Why Misdemeanors Matter*, 45 U.C. Davis L. Rev. at 279-280 (stating that in Detroit, Michigan, attorneys from a public defender service cover from 2400 to 2800 misdemeanors per year).

As a result of these pressures, low-level state criminal cases are routinely disposed of as early as the first court appearance. A 2009 New York Criminal Court report stated that, in New York City, "slightly less than half of all case filings were disposed of at their initial court appearance," and "[a]lmost all of these dispositions involved misdemeanor or other petty offenses." Criminal Court of the City of New York, *Annual Report 2009*, at 29 (July 2010), *available at* http://www.nycourts.gov/courts/nyc/criminal/AnnualReport2009.pdf; *see also* National Legal Aid & Defender Association, *A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis* 15 (June 2008), *available at* http://www.mynlada.org/michigan/

michigan_report.pdf (describing a common scenario in Michigan in which "clients are arraigned, pretrial conferences held, and, if a plea can be worked with the clients, sentences imposed generally all in a single day without defense counsel present").

In addition, a defendant represented by a public defender and charged with a misdemeanor or other low-level state offense may have minimal or no contact with counsel before the case is (often quickly) concluded, with no time for the development or investigation of evidence. *See* Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense* 13 (July 2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf ("In many jurisdictions across the country defenders meet with their clients minutes before their court appearance in courthouse hallways, often just presenting an offer for a plea bargain from the prosecution without ever conducting an investigation into the facts of the case or the individual circumstances of the client."); American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 16 (Dec. 2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf ("Witnesses recounted numerous examples of representation so minimal that it amounted to no more than a hurried conversation with the accused moments before entry of a guilty plea and sentencing."). One report describes arraignments for minor crimes in New York City:

> [L]arge percentages of misdemeanor, violation and infraction cases plead out at arraignment,

> often times after a lawyer has met with his or her client for only a couple of minutes. Attorneys are generally only armed with the charging document, defendant's rap sheet and the "[New York City Criminal Justice Agency] form." During these few minutes, attorneys are expected to assess whether to recommend the defendant plead or not, consult with the defendant and fully advise him or her of the consequences of pleading to a criminal charge, including all of the collateral consequences that come along with having a criminal conviction, such as housing, state and federal assistance and immigration issues. … [T]he pressure in New York City to dispose of cases is so strong, as a result of the sheer volume of cases that the courts process in any given day, that the focus becomes on pleas only.

The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services* 143 (June 2006) (footnote omitted), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf.

As these sources make clear, the prosecution of low-level state drug offenses is not a reasonable forum for the development of evidence relevant to possible future federal immigration proceedings, particularly when that evidence is not relevant to the criminal charge.

In addition, immigrants arrested for marijuana offenses often lack the personal resources and education necessary to muster a strong defense. Marijuana arrests are often targeted in poor and

minority communities. *See* Geller & Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. Empirical Legal Stud. 591, 593 (2010) (In New York City, "[s]treet stops are conducted predominantly in poor neighborhoods with high concentrations of black and Hispanic residents … and marijuana arrests are clustered in many of the same neighborhoods."). Immigrants as a group tend to be less educated and poorer than the general population. *See* Vastine, *Give Me Your Tired, Your Poor … and Your Convicted? Teaching "Justice" to Law Students by Defending Criminal Immigrants in Removal Proceedings*, 10 U. Md. L.J. Race, Religion, Gender & Class 341, 349 (2010) ("The educational level of the first generation immigrant is typically lower-than-average and a look at the wealth disparity of most first generation immigrants relative to the general population reveals a population more socio-economically vulnerable to both heavy policing and poor legal representation." (footnote omitted)); Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 551 (2009) ("Fifty-two percent of the foreign-born population are limited English proficient. … [T]hey are disproportionately poor and they are significantly more likely to be lacking in basic education." (footnote omitted)).

Immigrants prosecuted for low-level state marijuana offenses are thus uniquely ill-suited for the task of developing quantity and remuneration evidence that may be helpful in a future removal proceeding. Given these realities, the suggestion that immigrants will be protected from unjustified deportation because they can develop the necessary evidence in state court is simply unfounded.

III. Under The Fifth Circuit's Approach, Outcomes For Immigrants Would Differ Based Only On The Forum Of Conviction

The dilemma facing the petitioner in this case arose because he happened to be charged under a state statute that encompasses both federal felony and federal misdemeanor conduct. Under the Fifth Circuit's approach, this led to a presumption that petitioner was guilty of federal felony conduct. Because quantity and remuneration were not relevant to his state offense, evidence on these points was not admitted during his state prosecution.

Such a dilemma should not arise for defendants charged under federal law because quantity and remuneration are clearly relevant to the offense. Similarly, such a dilemma should not arise for defendants charged under state laws that punish non-remunerative distribution of "small" amounts of marijuana separately from other types of distribution. *See* n.4, *supra* (listing statutes).

However, the dilemma—and the possibility of a mandatory removal order—*will* arise for defendants charged under the many state marijuana distribution offenses that encompass both § 841(b)(4) conduct and certain other § 841 conduct. These are state offenses that encompass distribution of "small amounts" of marijuana for which the issue of remuneration is irrelevant, *see* n.8, *supra* (listing statutes), as well as state offenses that encompass non-remunerative distribution of marijuana for which the issue of drug quantity is irrelevant, *see* n.9, *supra* (listing statutes), or for which both "small" and larger quantities of marijuana are cov-

ered.[11] The list would also include state offenses that provide for non-remuneration as a mitigating factor allowing for a lower sentence—similar to the structure of § 841(b)(4)—but encompass both "small" and larger quantities of marijuana.[12]

Thus, under the Fifth Circuit's approach, immigrants convicted for low-level distribution offenses in certain states will face mandatory deportation, while those convicted for identical conduct in other states or in federal court will not. The difference in outcome will be based solely on the charging jurisdiction. Congress could not have intended such an unfair and capricious regime.[13]

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[11] N.C. Gen. Stat. § 90-95(b)(2), (h)(1)(a) (non-remunerative distribution of 5 grams to 10 pounds of marijuana); Minn. Stat. §§ 152.027(4)(a), 152.01(16) (non-remunerative distribution of "small amount" of marijuana, defined as less than 42.5 grams).

[12] S.C. Code Ann. § 44-53-370(a) (non-remuneration is an affirmative defense allowing for a lower sentence under S.C. Code Ann. § 44-53-460; quantity not specified); Va. Code Ann. § 18.2-248.1(a) (distribution of between one-half ounce and five pounds of marijuana; non-remuneration is an affirmative defense that may lower the offense level).

[13] To the extent that differences among state statutes could lead to different outcomes, the burden should be on the *government* to establish, based on the record of conviction, that anything more than the minimum punishable conduct occurred. The government is better equipped than the immigrant to make the necessary showing. *See* Part II, *supra*; 21B Wright & Graham, *Federal Practice and Procedure* § 5122 (2d ed. 2005) (noting that one traditional consideration in allocating the burden of proof is "whether one party has superior access to the evidence needed to prove the fact"). That result is also consistent with the categorical approach described by this Court, *see Johnson* v. *United States*, 130 S. Ct. 1265, 1269 (2010), which governs the application of the Immigra-

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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tion and Nationality Act to drug offenses, *see Carachuri-Rosendo*, 130 S. Ct. at 2586-2587.