No. 09-60

IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE IMMIGRANT DEFENSE PROJECT, THE IMMIGRANT LEGAL RESOURCE CENTER, AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 5-2 on the following question presented by this case: Whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

STATUTES

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*[1]

Lawful resident immigrants are deportable based on virtually any drug-related conviction. However, the Attorney General retains discretion to cancel removal in certain cases unless the immigrant is convicted of an "aggravated felony." In aggravated felony cases, Immigration Judges representing the Attorney General cannot consider cancelling removal. Nor are asylum or several other forms of relief available even if removal may be harmful for the non-citizen or her family. No exception exists, even for members or veterans of the U.S. Armed Forces, non-citizens with spouses and children who are citizens of the United States, non-citizens who have been gainfully employed, non-citizens who spent most of their lives in the United States, or asylum seekers who have experienced persecution in their home countries.

Amici, criminal defense and immigrant service organizations with criminal/immigration law and practice expertise, therefore know firsthand and are concerned that the holding of the court below—that two disparate, unconnected, low-level convictions for simple drug possession can be combined for the first time in federal immigration proceedings to become a conviction for "illicit trafficking in a controlled substance," and therefore an "aggravated felony"—imposes severe and unwarranted harm on long-term

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[1] Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

permanent residents and other non-citizens who pled guilty in summary proceedings to such low-level simple possession offenses.

The lower court's holding has been applied even where the state-law disposition is not a criminal "conviction" at all, but is a lower-level civil offense. In fact, many low-level simple possession cases have long been disposed of in state and county courts through quick and summary proceedings, yielding dispositions that bear no resemblance to federal recidivist felony convictions.

As organizations concerned with the proper and consistent interpretation of intersecting immigration and criminal law, *amici* believe the lower court's position is inconsistent with Congressional intent and common sense, and also works an unwarranted and confusing departure from the prior precedents of this Court, the considered judgment of the government's own Board of Immigration Appeals, and all but one of the other circuit courts that have addressed this question. *Amici* respectfully urge the Court to resolve the important issues raised in this matter consistent with the view of the majority of circuit courts and of the Board of Immigration Appeals.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in all 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, advance and disseminate knowledge in the area of criminal practice, and encourage integrity, independence, and

expertise among criminal defense counsel. NACDL is focused on advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

The **National Legal Aid and Defender Association** (NLADA), a non-profit corporation, works to support indigent defender services and provide civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council dedicated to promoting fair justice systems and ensuring citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including non-profit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members. NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national non-profit membership association that devotes its resources exclusively to serving the equal justice community. NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of that effort, NLADA has filed *amicus curiae* briefs in major constitutional cases before this Court and other federal and state courts involving the administration of the criminal justice system and the right to counsel.

The **Immigrant Defense Project** (IDP) provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and relied on *amicus curiae* briefs submitted by IDP in key cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including this Court's recent decision in *Lopez v. Gonzalez*, 549 U.S. 47 (2006). *See* Brief for *Amici Curiae* New York State Defenders Association Immigrant Defense Project, et al., *Lopez v. Gonzales*, 549 U.S. 47 (2006), available at http://www.immigrantdefenseproject.org/webPages/drugLitigationInit.htm; *see also* Brief for *Amici Curiae* NACDL, New York State Defenders Association Immigrant Defense Project, et al., *Leocal v. Ashcroft*, 543 U.S. 1 (2004); Brief for *Amici Curiae* NACDL, New York State Defenders Association Immigrant Defense Project, et al., *INS v. St. Cyr*, 533 U.S. 289 (2001) (cited at *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001)).

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to indigent immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

The **National Immigration Project of the National Lawyers Guild** (National Immigration Pro-

ject) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of IMMIGRATION LAW AND CRIMES and three other treatises published by Thomson-West. The National Immigration Project has participated as *amicus curiae* in several significant immigration-related cases before this Court.

SUMMARY OF ARGUMENT

This Court held in *Lopez* that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." 549 U.S. at 60. The Fifth Circuit nonetheless treated petitioner's state conviction as a felony punishable under the Controlled Substances Act even though the state offense of conviction—possession of Xanax without a prescription—is punishable only as a misdemeanor under federal law. In doing so, the Fifth Circuit became only the second court of appeals to take a position that has been soundly rejected by five of its sister courts (the First, Second, Third, Sixth, and Tenth Circuits) and by the government's own Board of Immigration Appeals (BIA).[2]

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[2] *Compare Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009); *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *with Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006); *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); *Rashid v. Mukasey*, 531 F.3d 438

The Fifth Circuit's interpretation makes a federal drug "trafficking" crime out of thousands of low-level simple possession dispositions, which are routinely handled in state and county courts through summary proceedings. In many jurisdictions, such violations result in no more than a small fine and often leave the defendant with no state "criminal record." The relatively minor penal law consequences of these proceedings are matched by their minimal procedural safeguards and perfunctory nature. Having had little opportunity or motivation to resist or contest the validity of such low-level charges, non-citizens detained and placed in removal proceedings in the Fifth Circuit now find themselves facing the U.S. immigration law's most severe and unyielding penalties.

To make matters worse, immigration proceedings offer no mechanism for these immigrants to challenge or even examine the validity of those low-level possession dispositions. Thus, non-citizens in the Fifth Circuit face mandatory detention and removal, with no opportunity to seek discretionary relief, even though they never had a genuine opportunity to examine—either in criminal or immigration proceedings—the existence or validity of any past simple possession convictions. This stands in stark contrast to the requirements enacted by Congress and the States for prosecuting and convicting individuals of recidivist drug possession offenses.

(6th Cir. 2008); *United States v. Santana-Illan*, No. 08-4210, 2009 WL 5103592 (10th Cir. Dec. 29, 2009); *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382 (BIA 2007) (en banc).

Beyond the direct impact of the Fifth Circuit's interpretation on individuals, it would also impede the efficient administration of justice. Imposing the drastic penalties of an "aggravated felony" determination on state simple possession dispositions, as required by the Fifth Circuit, would discourage defense counsel from recommending plea agreements for noncitizens charged with a second or subsequent possession offense. With the option of plea bargaining thus eliminated in many cases, the courts before which our member-practitioners practice will become increasingly unable to handle the massive and growing number of low-level drug possession prosecutions. Moreover, the Fifth Circuit's interpretation would frustrate the efforts by many States to relieve bloated criminal dockets and ease the overcrowding of jails and prisons through innovations such as drug courts, which rely on plea agreements to avoid trials and offer drug treatment as an alternative to incarceration.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION SWEEPS WITHIN THE "AGGRAVATED FELONY" "TRAFFICKING" TERM LARGE NUMBERS OF LOW-LEVEL SIMPLE POSSESSION OFFENSES BEARING NO RESEMBLANCE IN PRACTICE TO THE RECIDIVIST OFFENSES DESIGNATED BY CONGRESS.

The Fifth Circuit's decision treats virtually all second or subsequent state simple possession convictions as if they "could have been punished as a felony under federal law" even if such federal prosecutions would have depended on proof of facts beyond those

required by the state statute of conviction.[3] The Fifth Circuit's approach would combine even a non-criminal charge for de minimis marijuana possession in 2000 and an unrelated non-criminal charge for de minimis marijuana possession in 2007 to form a mythical drug "trafficking" conviction for the non-citizen.[4] The Fifth Circuit thus conflates unrelated and disparate acts of simple drug possession into the federal felony of recidivist possession.

In defending this view, the government has likewise analogized low-level state drug possession offenses to the federal felony of recidivist possession, even when such low-level state simple possession offenses bear no similarity, in law or in practice, to the federal felony of recidivist possession under 21 U.S.C. § 844(a). The federal recidivist statute, 21 U.S.C. § 851, requires prosecutors to make an affirmative decision to charge the fact of the alleged prior conviction and further guarantees the defendant the right to challenge the fact and validity of that earlier conviction. Federal prosecutors invoke Section 851 sparingly, and almost never against defendants who plead guilty. By contrast, simple drug possession prosecutions are processed in massive numbers, at great speed, with minimal procedural protections, and frequently without counsel—all without litigation over the validity of any prior conviction. There is no reason to believe that Congress contemplated, much less intended, in its drafting of

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[3] *Carachuri-Rosendo*, 570 F.3d at 266-67.

[4] *See In re Jerry Lemaine*, A74 239 713 (BIA March 4, 2008), *appeal docketed*, No. 08-60286 (5th Cir. August 7, 2008).

the aggravated felony provision, that the two would be treated the same.

A. To Obtain A Conviction For Felony Recidivist Drug Possession, A Federal Prosecutor Must Charge, Prove, And Defend As Valid, The Defendant's Prior Drug Possession Conviction, Which Federal Prosecutors Rarely Do.

In both law and practice, a federal felony recidivist possession conviction represents a federal prosecutor's determination to charge, and a court's finding as part of its judgment, that the individual engaged in a more serious offense than simple drug possession. In fact, in custom and practice, federal felony recidivism prosecutions are infrequently brought, in large part because prosecutors generally do not prosecute defendants as recidivists if defendants plead guilty.[5] The United States Sentencing Commission gathered data in 1995 and again in 2000 and found that, respectively, only 6.5 percent and 6.9 percent of offenders with prior *felony* drug convictions were adjudicated as recidivists.[6] As a result,

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[5] Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements In A World of Guilty Pleas*, 110 YALE L.J. 1097, 1153 (2001).

[6] THE UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 89 (November 2004), available at http://www.ussc.gov/15_year/15_year_study_full.pdf.

the Commission correctly observed that the recidivist offense "is more often avoided than sought."[7]

Indeed, official Department of Justice policy explicitly permits prosecutors to forgo recidivist charges "after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity."[8] This reflects Congress's mandate that an exercise of prosecutorial discretion in favor of charging a defendant as a recidivist *must* precede any punishment of the offender as a recidivist[9]—a requirement of particular importance for non-citizen defendants given that the consequences of that label are so severe for them. In fact, both the BIA and the Department of Homeland Security (DHS), at an earlier stage in this litigation, recognized the critical importance of the prosecutor's decision not to seek a recidivist conviction.[10]

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[7] *Id*.

[8] John Ashcroft, *Memo Regarding Policy On Charging Of Criminal Defendants Charging Memo* (September 22, 2003), *available at* http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

[9] *See United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002) (noting that the key purpose of § 851 was to grant prosecutors "discretion [over] whether to seek enhancements on prior convictions").

[10] *See Carachuri-Rosendo*, 24 I. & N. Dec. at 392 ("Federal recidivist felony treatment hinges not simply on potential punishment; it requires the actual invocation by a Federal prosecutor of the recidivist enhancement features of Federal law. Indeed, the DHS acknowledges that a State possession offense cannot correspond to a Federal recidivist felony unless the State prosecutor actually invoked the available recidivist enhancement provisions of State law.").

The government's position here, on the other hand, would require an immigration court to find that a non-citizen had been "convicted" of a "recidivist felony" offense even though the prosecutor decided *not* to charge a recidivist offense. In fact, even a defendant's conviction in district court for a *federal misdemeanor*, based on the federal prosecutor's decision not to seek a "recidivist" judgment, would turn into a conviction for the aggravated felony of recidivist drug possession if later immigration proceedings are commenced. This cannot be. Congress could not have intended, without clearly saying so, that a federal misdemeanor conviction is really a federal felony conviction, and an aggravated felony at that.

Moreover, the federal recidivist statute, 21 U.S.C. §§ 844(a) and 851, guarantees defendants who are charged under it an array of important protections, beginning with the requirement that the prosecutor allege the fact of the prior conviction in a pretrial information that guarantees the defendant the opportunity to confront the allegation.[11] Thus, in Section 851, Congress (i) demanded that a prosecutor affirmatively advance a recidivism charge, and (ii) provided the accused the right to challenge a prior conviction before the defendant can be convicted as a recidivist.[12] As the BIA observed: "[T]hese minimal requirements governing findings of recidivism are part and parcel of what it means for a crime to be a

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[11] *See* 21 U.S.C. §§ 844(a), 851.

[12] *See Custis v. United States*, 511 U.S. 485, 491-92 (1994).

'recidivist' offense."[13] Without complying with Sections 844(a) and 851, a federal prosecutor can only charge a defendant with a simple possession misdemeanor—and thus there can be no conviction of a recidivist felony.[14]

B. The Vast Majority Of States Also Have Recidivist Possession Statutes That Require A Finding Of Recidivism.

Federal law is not unique in providing for enhanced punishment in those possession cases where a state has determined that a prior possession conviction is serious enough to warrant recidivist treatment. At least 45 states have statutes providing separate offenses for simple possession and recidivist possession[15]—among these are state recidivist pos-

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[13] *Carachuri-Rosendo*, 24 I. & N. Dec. at 391.

[14] *See United States v. LaBonte*, 520 U.S. 751, 759-60 (1997).

[15] *See* Ala. Code § 13A-12-213(a)(2); Alaska Stat. § 12.55.155(c)(15); Ariz. Rev. Stat. § 13-901.01; Ark. Code Ann. § 5-64-401(c)(2)-(3); Cal. Penal Code § 1210.1(b)(5); Colo. Rev. Stat. § 18-1.3-801; Conn. Gen. Stat. § 21a-279(a) and (b); 11 Del. C. § 4214; D.C. Code § 48-904.08(a); Ga. Code Ann. § 16-13-30(a), (c), (e), (g), (l); Haw. Rev. Stat. § 706-606.5(1)(a)-(c); Idaho Code § 37-2739(a); 720 Ill. Comp. Stat. 550/4; Ind. Code Ann. § 35-48-4-11(c); Iowa Code § 124.401(5); Kan. Stat. Ann. § 65-4162; Ky. Stat. Ann. §§ 218A.1415-17; Lou. Rev. Stat. § 40:966(E); Md. Code Crim. Law §§ 5-905; 5-601(c)(2); Mass Gen. Laws ch. 94C, § 34; Mich. Comp. L. 333.7413(2); Minn. Stat. 152.021-025(3); Miss. Code § 41-29-147; Mo. Rev. Stat. § 195.285; Mont. Code. § 46-18-501; Neb. Rev. Stat. § 29-2221; Nev. Rev. Stat. 193.130; N.H. Rev. Stat. § 651:6; N.M. Stat. 31-18-17; N.Y. Penal Law 70.70(3); N.C. Gen. Stat. § 90-95(e)(3)-(4); N.D. Cent. Code § 12.1-32-09; Ohio Rev. Code. Ann. 2925.11(C)(2)(A); Okla. Stat. tit. 63, § 2-402(B); 35 Pa. Cons.

session statutes incorporating requirements that the prosecutor affirmatively charge the prior offense and that the defendant have the opportunity to challenge it. For example, Texas Penal Code § 12.43 provides misdemeanor recidivist convictions if, and only if, the prosecutor has "shown on the trial . . . that the defendant has been before convicted" of any felony or certain misdemeanors. Texas law guarantees that "[a] prior conviction that was alleged for enhancement may be collaterally attacked if it is void (as it would be if it were based on a fundamentally defective indictment) or if it is tainted by a constitutional defect (as it would be if an indigent defendant had been denied counsel in a felony trial)."[16]

Other States draw similar distinctions between recidivist and non-recidivist offenses. For example, anyone charged under the Massachusetts recidivist possessor statute "shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials."[17] Under Massachusetts law, a recidivist posses-

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Stat. Ann. § 780-113(b)(c); R.I. Gen. Laws 21-28.4.11(A); S.C. Code Ann. 44-53-370; S.D. Codified Laws 22-7-7; Tenn. Code Ann. 39-17-418; Tex. Penal Code § 12.42; Utah Code Ann. § 58-37-8(2)(c), 2(d); Vt. Stat. Ann. tit. 18, 4238; Va. Code Ann. § 18.2-250.1(A); Wash. Rev. Code 69.50.408, 425; Wis. Stat. 961.41(3g)(e); Wyo. Stat. Ann. § 35-7-1031(c)(i).

[16] *Galloway v. State*, 578 S.W.2d 142, 143 (Tex. Crim. App. 1979).

[17] *See* Mass. Gen. Laws ch. 278, § 11A ("If a defendant pleads guilty [to a subsequent offense] or if there is a verdict or finding of guilty after trial, then before sentence is imposed, the defendant shall be further inquired of for a plea of guilty or not guilty to that portion of the complaint or indictment alleging that the crime charged is a second or subsequent offense. If he

sion offense authorizes a term of imprisonment twice as long as a simple possession offense.[18]

C. The Common And Low-Level State Simple Possession Offenses Swept Up By The Fifth Circuit's Approach Bear No Resemblance, In Doctrine Or Practice, To Federal Felony Recidivist Possession.

Simple drug possession prosecutions stand in stark contrast to federal felony recidivism prosecutions in both law and practice. Although federal recidivist prosecutions require special due process protections and an explicit court finding, state simple drug possession pleas are obtained in massive numbers, with great speed, and with minimal process. By automatically equating a low-level state simple drug possession disposition—*i.e.*, one that was not prosecuted as a recidivist offense—with federal felony recidivism, the Fifth Circuit's decision imposes the immigration system's severest penalties on noncitizens who may have pleaded guilty in quick and summary proceedings designed for the most minor of offenses.

In contrast to the care exercised in those rare instances of felony recidivist prosecutions for drug possession, state simple drug possession charges are legion. In 2000 alone, more than 1.5 million persons were arrested for a drug offense, and more than four-

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pleads guilty thereto, sentence shall be imposed; if he pleads not guilty thereto, he shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials.").

[18] *See* Mass. Gen. Laws ch. 94C, § 32D(a)-(b).

fifths of these arrests were for drug possession.[19] Moreover, the numbers have trended upward dramatically in recent years, particularly for low-level offenses—such as the possession of small amounts of marijuana. For example, in Illinois from 1995 to 2005, the arrest rate for marijuana violations increased 54 percent.[20] Nationally, between 1990 and 2002, marijuana possession arrests increased by 113 percent.[21] In some localities, including our largest metropolitan areas, this expansion was even more dramatic. In New York City for example, marijuana arrests increased by 882 percent over the same pe-

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[19] *See* Arthur J. Lurigio, Fed. Probation 13, 13 (June 27, 2008) ("Since the 1980s an overwhelming emphasis on law enforcement strategies to combat illegal drug possession and sales has resulted in dramatic increases in the nation's arrest and incarceration rates. Although general population surveys reported declines in illegal drug use during the 1990s, rates of arrest and incarceration for drug offenses rose at a record pace into the twenty-first century. Drug offenses have been among the largest categories of arrests for the past 20 years. From 1980 to 2000, arrests for drug offenses more than doubled." (internal citations omitted)).

[20] ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, TRENDS AND ISSUES 2008: A PROFILE OF CRIMINAL AND JUVENILE JUSTICE IN ILLINOIS: 1995-2005 (May 2008), *available at* http://www.icjia.state.il.us/public/pdf/TI%202008/T&I%202008%20Full%20Report.pdf.

[21] Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, 3 HARM REDUCTION J. 1, 3 (2006), *available at* http://www.harmreductionjournal.com/content/pdf/1477-7517-3-6.pdf.

riod.[22] The most common arrest was for possession of marijuana in the public view.[23]

The criminal penalties imposed for these large numbers of low-level state possession dispositions are relatively minor. Between 1995 and 2004, for example, New York State convicted 258,655 people for Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor under New York law,[24] and almost 60 percent resulted in sentences of time served, probation, conditional discharge (a sentence imposed in lieu of incarceration), or a simple fine. Of the remainder, the median length of sentence imposed was approximately nineteen days.[25] Indeed, in several states, simple marijuana possession "absent aggravating circumstances . . . is a *non-criminal* violation."[26]

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[22] *Id*. at 8.

[23] *See* Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnic Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 132-33 (2007).

[24] N.Y. STATE DEFENDERS ASS'N, ANALYSIS OF NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES MISDEMEANOR DRUG OFFENSE STATISTICS FOR THE YEARS 1995 THROUGH 2004 (2005), *available at* http://www.immigrantdefenseproject.org/docs/05_Analysis.pdf. A person is guilty of Criminal Possession of a Controlled Substance in the Seventh Degree when he knowingly and unlawfully possesses a controlled substance. N.Y. PENAL LAW § 220.03.

[25] N.Y. STATE DEFENDERS ASS'N, *supra* note 24.

[26] *See People v. Finley*, 891 N.E.2d 1165, 1169 (N.Y. 2008) (emphasis added) (citing N.Y. Penal Law Section 221.05); *People v. White*, 56 N.Y.2d 110, 112 (N.Y. 1982) (explaining that § 221.05 is "defin[ed] . . . as 'unlawful' rather than 'criminal'"); *see also* Minn. Stat. § 152.027, subd. 4(a) (classifying possession

In contrast to the protections afforded by the federal and state recidivist possession statutes, low-level state drug charges are often processed quickly and with minimal procedural protections due to the understanding that serious consequences will not follow from a conviction. Defendants facing such charges often get arraigned, plead guilty or "no contest," and are sentenced on the same day.[27] Likewise, neither the defense nor the prosecution has the time or resources to investigate the merits of individual cases. Indigent defendants may speak to their defense attorney for the first time only minutes before arraignment, if at all.

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of "small amount of marijuana" as a "petty misdemeanor"); Minn. Stat. § 609.02, subd. 4a (stating that a "petty misdemeanor" "does not constitute a crime"); Mass. Gen. Laws ch. 94C, § 32L (classifying possession of one ounce or less of marijuana as a "civil offense"); Me. Rev. Stat. tit. 22 § 2383(1)(A) (classifying possession of up to 2 1/2 ounces of marijuana as a "civil violation"). Numerous other states punish simple possession of a small quantity of marijuana as an extremely low-grade offense carrying no possible jail sentence. *See, e.g.*, Cal. Health & Safety Code § 11357(b) (imposing up to $100 fine for possession of not more than 28.5 grams of marijuana); Colo. Rev. Stat. § 18-18-406(1) (imposing penalty of up to $100 fine for possession of not more than one ounce of marijuana); Miss. Code Ann. § 41-29-139 (imposing penalty of between $100 and $250 fine for possession of up to 30 grams of marijuana); Neb. Rev. Stat. Ann. § 28-416(13)(a) (imposing a $300 fine and requiring attendance at an educational class); Ohio Rev. Code Ann. § 2925.11(C)(3)(a) (classifying possession of less than 100 grams of marijuana as a "minor misdemeanor"); Ohio Rev. Code Ann. § 2901.02 (noting potential penalty for minor misdemeanor is a fine not exceeding $150).

[27] *See* N.Y. STATE BAR ASS'N, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES 17–18 (2001).

Many do not even have an attorney. A 2000 Bureau of Justice Statistics report revealed that 28.3 percent of surveyed state-jail inmates had no counsel in the misdemeanor prosecutions leading to their incarceration.[28] Uncounseled misdemeanor pleas are even more prevalent in Texas. An April 2009 report of *amicus* NACDL found that "[t]he vast majority of jailable misdemeanor cases in Texas are resolved by uncounseled guilty pleas," with three-quarters of Texas counties appointing counsel in fewer than 20 percent of jailable misdemeanor cases.[29] In one Texas county, *amicus* NACDL's researchers observed court staff routinely directing uncounseled misdemeanor defendants to confer directly with the prosecutor regarding a possible plea; in some cases defendants pleaded to jail sentences without being informed of their right to counsel.[30]

At the same time, states have expanded drug possession statutes to sweep in even wider ranges of conduct, including possession absent traditional levels of scienter.[31] In addition, due to the immense number of simple possession arrests, many jurisdic-

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[28] CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES, NCJ 179023 at 6, Table 13 (Nov. 2000).

[29] ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 15 (2009) (internal quotation marks and citation omitted), *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf.

[30] *Id.* at 16-17.

[31] MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USES AND ABUSES OF VICTIMS' RIGHTS 35-37 (2002) (describing state statutes that do not require proof that the individual knew he or she was "possessing anything at all").

tions have lowered procedural and evidentiary protections far below those afforded for other misdemeanors, let alone the protections required for felonies. Thus, those accused of drug possession have few available defenses. For example, many cannot take advantage of distinctions between principals and accomplices.[32] "Whereas the law of complicity has long been careful to remind itself that mere presence does not an accomplice make, the law of possession has had no difficulty imposing liability on that very basis."[33] As one illustration, in New York, "from evidence of your being in a car or a room with a controlled substance, the prosecutor without additional evidence, gets to jump to the conclusion that you possessed the drugs, and [that you] knew that you did."[34] As a result, a single drug item (including paraphernalia) found in a car will be treated as "possessed" by every person in the car, and all the occupants are subject to prosecution.[35] By contrast, in federal drug possession prosecutions, mere proximity to a narcotic or mere association, without more, is not proof of possession sufficient to raise the presumption of guilt.[36]

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[32] Dubber, *supra* note 31, at 38.

[33] *Id*. at 65; *see also id*. at 35 (describing how possessory offenses do not lend themselves to defenses of necessity or self-defense).

[34] *Id*. at 37.

[35] *See, e.g.*, N.Y. Penal Law § 220.25 ("The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found . . . .").

[36] *See U.S. v. Canada*, 459 F.2d 687, 688 (5th Cir. 1972); *Araujo-Lopez v. U.S.*, 405 F.2d 466, 467 (9th Cir. 1969); *Amaya*

In addition, many of the courts in which state simple drug possession charges are prosecuted bear little resemblance to those courts where federal felony recidivism prosecutions are brought. For example, in New York, drug misdemeanor or non-criminal violation cases may be heard before one of the State's 1,250 town or village courts in which three-quarters of the judges are non-lawyers who, until very recently, received only a single week of training.[37] Recent investigations have documented the "extensive failings in the courts—including town and village justices who . . . made racist remarks, released friends without bail, denied some defendants lawyers and jailed some of them without trials."[38] In 2008, a commission appointed by then Chief Judge of the New York Court of Appeals, Judith S. Kaye, noted that "many non-attorney justices face difficulties handling complex motions and misdemeanor jury trials."[39]

As noted earlier, the contrast with federal recidivist prosecutions is stark indeed.[40] The Fifth Circuit's decision to treat all second or subsequent simple pos-

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v. U.S., 373 F.2d 197, 199 (10th Cir. 1967); *Bass v. U.S.*, 326 F.2d 884, 886 (8th Cir. 1964).

[37] *See* William Glaberson, *Reform of New York's Courts Stalls*, N.Y. TIMES, Jan. 8, 2010 A18; *see also* TESTIMONY OF COREY STOUGHTON, STAFF ATTORNEY AT THE NEW YORK CIVIL LIBERTIES UNION BEFORE JUDICIARY COMMITTEE OF THE NEW YORK STATE ASSEMBLY REGARDING PROPOSALS TO REFORM THE NEW YORK STATE JUSTICE COURTS (Dec. 14, 2006), *available at* http://www.nyclu.org/node/748.

[38] *Id*.

[39] *Id*.

[40] Bibas, *supra* note 5, at 1153.

session convictions as recidivist convictions runs counter not only to the law but also to the realities of low-level drug prosecutions.

II. LOW-LEVEL POSSESSION DISPOSITIONS CANNOT BE CHALLENGED OR EVEN EXAMINED IN SUBSEQUENT IMMIGRATION PROCEEDINGS.

By enacting 21 U.S.C. §§ 844(a) and 851, Congress ensured that no person would be convicted of federal felony recidivist possession without a fair opportunity to challenge the fact and validity of the alleged prior conviction. The court below erred in concluding that a non-citizen could be deemed "convicted" of a recidivist possession felony based on a simple possession charge that does not even mention any prior conviction. The consequences of this omission are magnified by the fact that immigration proceedings likewise offer no opportunity to examine the validity of alleged prior possession dispositions—a defect of serious concern given the circumstances described *supra* in Argument Point I—and, as a practical matter, place extreme burdens on a non-citizen's ability to challenge even the fact of a prior disposition. As a result, persons facing removal on account of a second simple possession non-recidivist conviction will have had no opportunity to challenge alleged prior possession convictions in *either* their criminal *or* immigration proceedings.

Removal proceedings offer immigrants no opportunity to challenge the validity of prior convictions.[41]

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[41] *See Mansoori v. INS*, 32 F.3d 1020, 1023-24 (7th Cir. 1994) (finding immigration judges lack statutory authority to review the validity of a prior conviction); *Matter of Rodriguez-*

If the evidence indicates that a removable offense occurred, "an immigration judge cannot go behind the judicial record."[42] This prohibition remains even where the non-citizen was not represented by counsel in the prior criminal proceeding—an all too common circumstance, as discussed above.[43] This stands in contrast to federal criminal proceedings, where the legal consequence of denial of counsel outright must be considered by a judge before deciding whether to punish the defendant as a recidivist.[44]

Non-citizens in immigration proceedings are limited even in being able to challenge the "fact" of the prior conviction. DHS has "the burden of establishing by clear and convincing evidence" the non-citizen's prior conviction alleged as the basis for removal;[45] however, Immigration Judges often find that DHS has met this burden by presenting minimal documentation, such as a "rap sheet." In practice, what

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Carrillo, 22 I. & N. Dec. 1031, 1034 (BIA 1999) ("[I]t is clear that an Immigration Judge and the Board [of Immigration Appeals] cannot entertain a collateral attack on a judgment of conviction, unless that judgment is void on its face, and cannot go behind the judicial record to determine the guilt or innocence of an alien.").

[42] *Matter of Khalik*, 17 I. & N. Dec. 518, 519 (BIA 1980).

[43] *Matter of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976) ("[C]ounsel claims that the respondent was not represented at the time of the 1971 Illinois conviction. We, however, may not go behind the record of conviction.").

[44] *See Custis v. United States,* 511 U.S. 485, 489 (1994) (recognizing "the right of a defendant who had been completely deprived of counsel to assert a collateral attack on his prior convictions").

[45] 8 U.S.C. § 1229a(c)(3)(A).

should be a straightforward process is often compromised by serious errors in the documentary record. According to a 2007 study: "Fully 62 percent of [a] random sample of official [New York] state rap sheets contained at least one significant error; 32 percent had multiple errors."[46]

Moreover, because non-citizens deemed deportable based on drug offenses are subject to mandatory detention, it is particularly difficult to mount any challenge to the validity or even the fact of a prior drug conviction. According to the Department of Justice, 84 percent of detained non-citizens in removal proceedings are unrepresented, compared to 58 percent of all non-citizens in removal proceedings.[47] Even non-citizens who obtained counsel at the outset commonly lose that legal assistance following a transfer.[48] During the first six months of 2008, the

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[46] J. McGregor Smyth, Jr., *From Arrest to Reintegration*, 24 Crim. Just. 42, 45 (Fall 2009).

[47] AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 30 (2009) (citing Executive Office for Immigration Review, Department of Justice, *FY 2007 Statistical Yearbook* G1 (2008)), *available at* http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf.

[48] Peter Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 558 (2009) (noting the "significant disincentive for private and pro bono attorneys to take on detained clients in removal proceedings" due to high rate of detainee transfer and immigration courts' refusal to allow counsel to make telephonic appearances); HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY, 49-55 (Dec. 2009), *available at* http://www.hrw.org/sites/default/files/reports/us1209web.pdf. (discussing cases of detained respondents who lost counsel following transfer).

latest period for which complete data are available, the majority (52.4 percent) of detainees were transferred.[49] Motions to change venue, so that a client can be returned to the jurisdiction where he had previously obtained counsel, are frequently denied.[50]

Furthermore, detained individuals are often transferred to facilities far from the location of their removable offense. DHS "has adopted a freewheeling transfer policy," moving detainees "often over long distances and frequently to remote locations."[51] This

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[49] Transactional Records Access Clearinghouse ("TRAC"), HUGE INCREASE IN TRANSFERS OF ICE DETAINEES (2009), *available at* http://trac.syr.edu/immigration/reports/220/. Almost half of all detainees transferred are transferred multiple times—there are now more transfers than there are detainees. *See id*.

[50] *See Matter of Rahman*, 20 I. & N. Dec. 480, 485 (BIA 1992) (holding that distant location of attorney did not require immigration judge to grant motion for change of venue); Markowitz, *supra* note 48, at 558 n.80 (collecting cases); Locked Up, *supra* note 48, at 62 ("[C]ourts have consistently held that the location of a detainee's attorney . . . is insufficient cause for change of venue.").

[51] TRAC Report, *supra* note 49*; see also* Department of Homeland Security, OIG-09-41, Immigration and Customs Enforcement's Tracking and Transfers of Detainees, 8 (March 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf ("Detainees may be transferred anywhere in the United States, depending on a facility's space availability."). ICE acknowledges that "significant detention shortages exist in California and the Mid-Atlantic and Northeast states. When this occurs, arrestees are transferred to areas where there are surplus beds." DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (Oct. 2009), *available at* http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. Most of these transferred detainees "are sent

makes it that much more difficult to gather and present evidence in immigration proceedings that would speak to the validity or even the existence of a prior conviction.

III. THE FIFTH CIRCUIT'S POSITION WILL PLACE A SUBSTANTIAL AND UNWARRANTED BURDEN ON THE CRIMINAL JUSTICE SYSTEM.

The massive and growing number of low-level drug possession prosecutions imposes a huge burden on the criminal justice system. To ensure that courts do not become overwhelmed addressing low-level offenses at the expense of more serious offenses, state governments have taken measures to alleviate these burdens. If affirmed, the Fifth Circuit's decision will frustrate these measures and have a profound impact on courts' abilities to ensure proper functioning of state criminal justice systems.

One necessary tool in the efficient administration of justice is plea bargains.[52] Guilty pleas not only substantially reduce the number of time-consuming and costly trials, but also the resulting bargained-for sentences take significant pressure off penal institutions by decreasing the amount of time they must house and care for defendants. The latest U.S. Sen-

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from eastern, western and northern state detention facilities to locations in the southern and southwestern United States." DEPARTMENT OF HOMELAND SECURITY, OIG_10-13, IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 1 (Nov. 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-13_Nov09.pdf.

[52] *See, e.g.*, *Santobello v. New York*, 404 U.S. 257, 261 (1971) (referring to plea bargains as "not only an essential part of the process but a highly desirable part for many reasons").

tencing Commission Annual Report reflects that, in 2008, 97.7 percent of all federal prosecutions for simple possession ended with plea bargains.[53]

For drug possession offenses, the distinction between simple and recidivist offenses serves an important role in plea bargaining. When a defendant is potentially chargeable with recidivist possession, the prosecutor can offer and the defendant can accept the reduced charge and lower sentence that comes with a simple possession charge.

But the Fifth Circuit's decision denies state and local prosecutors the benefit they can offer by reducing the charge in the case of immigrants charged with a second possession offense. In the Fifth Circuit, where a conviction for low-level simple possession is treated the same as a conviction for recidivist possession, even an immigrant convicted of low-level simple possession will face the severest immigration consequences—including classification as an "aggravated felon" and the resulting expedited removal proceedings, denial of all possible eligibility for cancellation of removal and asylum, and a permanent prohibition on re-entering the United States.

These immigration consequences will almost always far outweigh the immediate benefits of a guilty plea to non-recidivist possession. Because the Fifth Circuit's interpretation of the "aggravated felony" statute treats a second simple possession offense and a recidivist offense as the same, prosecutors and defendants must likewise treat them the same where the defendant is a non-citizen, even if the effect is to increase unnecessary burdens on already overtaxed

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[53] U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 11 (2008), *available at* http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm.

courts and detention centers. The Fifth Circuit gives the immigrant defendant little choice but to fight the possession charge, even if it means taking the case to trial. The few who plead guilty will likely be those who do not understand the risk of doing so. As this Court has recognized: "Plea agreements involve a *quid pro quo* between a criminal defendant and the government, and there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions' immigration consequences."[54]

In light of the federal policy of encouraging guilty pleas and the sound exercises of prosecutorial discretion in that process, it is unlikely that Congress intended this result. Under federal law, plea bargaining is incentivized by the U.S. Sentencing Guidelines,[55] and federal judges likewise encourage guilty pleas by generally accepting a prosecutor's sentence recommendation or otherwise imposing lower sentences on defendants who plead guilty.[56]

Indeed, as noted above, the desire to facilitate guilty pleas, and thereby relieve burdens on the federal criminal justice system, is the primary factor in

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[54] *INS. v. St. Cyr*, 533 U.S. 289, 321 (2001); *see also Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien charged with a crime involving controlled substances would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented.").

[55] U.S. SENTENCING COMMISSION, U.S. SENTENCING GUIDELINES MANUAL 3E1.1 (2009) (giving a two-point reduction for acceptance of responsibility, plus a third point for a timely guilty plea where the adjusted offense level is sixteen or higher).

[56] Bibas, *supra* note 5, at 1153.

a federal prosecutor's decision to forgo recidivist prosecutions under Section 851. Accordingly, as described *supra* at Section I.A., only a relatively small number of defendants who could be prosecuted for felony recidivist possession ever face such a charge.

Moreover, most states make use of specially enacted drug courts to handle many low-level possession offenses, allowing judges to make use of cost-effective alternatives to incarceration if the defendant is prepared to plead guilty or otherwise admit to facts sufficient for a conviction. These dispositions may still be found to constitute a "conviction" for the purpose of 8 U.S.C. § 1101(a)(48)(A), which defines a "conviction" as "a formal judgment of guilt of the alien entered by a court" or "if adjudication of guilt has been withheld, where: (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[57]

States first implemented these drug courts precisely because "[c]ourt dockets became overloaded with drug cases and drug-involved offenders, leaving fewer resources available to adjudicate serious, violent felonies."[58] And states have increasingly turned to them as an effective way to manage their criminal

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[57] *See Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute despite successful completion of probation leading to Idaho vacatur of the plea).

[58] DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS (1998), *available at* http://www.ncjrs.gov/html/bja/decade98.htm.

justice resources. There are currently 2,140 drug courts in use and another 284 in planning stages, representing a 32 percent increase since 2004.[59] The Fifth Circuit's approach would restrict these state efforts to manage their own criminal justice systems by undermining the usefulness of drug courts in the increasingly large number of cases involving non-citizen defendants.

This Court recently reaffirmed, in the sentencing context, the important federalism principles that the decision below frustrates: "Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status. We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so."[60] Because Section 1101(a)(43)(B) operates within a framework of plea bargains, prosecutorial discretion, and deference to states' efforts to administer their own criminal justice systems, Congress should not be understood, without some express directive, to have so severely burdened the states' criminal justice systems

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[59] OFFICE OF NATIONAL DRUG CONTROL POLICY, DRUG COURTS, http://www.whitehousedrugpolicy.gov/enforce/DrugCourt.html (last visited Aug. 10, 2009); C. WEST HUDDLESTON, III, ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING-COURT PROGRAMS IN THE UNITED STATES 1 (2008), *available at* http://www.ndci.org/sites/default/files/ndci/PCPII1_web%5B15D.pdf.

[60] *Oregon v. Ice*, 129 S. Ct. 711, 718-719 (2009) (internal citations omitted); *see also id.* at 719 ("We will not so burden the Nation's trial courts absent any genuine affront to [constitutional principles].").

and hampered their ability to legislate and exercise their considered judgment in such matters.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

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