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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

Amicus Invitation No. 15-08-26.	
In Removal Proceedings	Case No.: Redacted

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF FEDERATION FOR AMERICAN IMMIGRATION REFORM

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I. INTEREST OF AMICUS CURIAE

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request of the Board of Immigration Appeals, dated August 26, 2015, for supplemental briefing on this matter.

II. SUMMARY OF THE FACTS

The respondent is a native and citizen of Venezuela who has been admitted as a lawful permanent resident. On January 24, 2014, the respondent was convicted in Pennsylvania under 35 Pa. Const. Stat § 780-113(a)(30). Subsequent to his conviction, the respondent was placed in removal proceedings due to his conviction for an aggravated felony under Immigration and Nationality Act (INA) § 101(a)(43)(B). On April 15, 2015, the Immigration Judge (IJ) discussed the conviction under the hypothetical federal felony test used in *Jeune v. Att'y Gen. of U.S.*, 476 F.3d 199 (3d Cir. 2007), but ultimately used the framework elucidated in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) to find the alien had committed an aggravated felony. (IJ Op., *5). On August 26, 2015, the Board of Immigration Appeals (Board) began solicitation for *amicus curiae* briefs to discuss the discrete issues presented within their invitation.

III. ISSUES PRESENTED

The *amicus* has provided supplemental briefing of the following issues for the Board's consideration in the instant case:

- May the Board decline to follow the Third Circuit's precedent in *Jeune v. Att'y Gen. of U.S.*, 476 F.3d 199 (3d Cir. 2007), which is applicable to the present case but did not address 35 Pa. Const., Stat. § 780-113(a)(31)?

- Does *Matter of Anselmo*, 20 I&N Dec. 25 (B.I.A. 1989) affect the Board's ability to decline to follow *Jeune v. Att'y Gen. of the U.S.*?
- Regardless of the binding precedential affect of the Third Circuit's decision in *Jeune,* has the case been abrogated by the Supreme Court's decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013)?

IV. SUMMARY OF THE ARGUMENT

The Board should use the modified categorical test to determine that convictions under both Pa. Const., Stat. § 780-113(a)(30) and (31) may constitute aggravated felonies. While the Board cannot decline to follow *Jeune*, the Board may find that the application of this precedent yields inconsistent results. Therefore, the Board should not automatically defer to its findings to interpret the subsections of the Pennsylvania statute because it has yet to analyze § 780-113(a)(31) singularly or its interplay with § 780-113(a)(30). As the agency charged with interpretation of immigration law and policy, the Board's interpretation requires deference from the Third Circuit. As such, *Matter of Anselmo* is not binding upon the Board not only because the IJ and Board's determination require deference from the courts but because neither the Third Circuit nor the Board have used *Matter of Anselmo* in any significant manner that would influence the Board in the present case.

While the Board otherwise would be bound by the Third Circuit in *Jeune*, that decision has been superseded by the Supreme Court's *Moncrieffe v. Holder* decision. Although the Board is bound by this Supreme Court decision, it should also consider several issues that would require the Board to deviate from a strict reading of *Moncrieffe*. First, to keep consistent with its own decisions as well as that of the Third Circuit, the Board should apply the modified categorical approach to analyzing Pa. Const., Stat. § 780-113(a)(30) and (31). Second, the Board

should not apply the rule of lenity and follow its own interpretation of what constitutes a "small amount" of marijuana for the effective and consistent application of the INA. Finally, if the Board finds that § 780-113(a)(31) does not constitute an aggravated felony, it should create a presumption that a conviction under § 780-113(a)(30) does.

V. ARGUMENT

A. The Board Should Continue to Follow the Third Circuit's Decision in *Jeune v. Att'y Gen. of U.S.* But Acquiescence Does Not Prevent the Board From Using the Third Circuit's Precedent to Find Pa. Const., Stat. § 780-113(a)(31) Can Constitute an Aggravated Felony.

Under 8 U.S.C. § 1252(a)(1), Congress has provided for the general judicial review of final orders of removal. An appeal from the Board "shall be filed with the court of appeals for the judicial Circuit in which the immigration judge completed the proceedings." *Id.* at § 1252(b)(2). Congress has given individual Circuits the power to review the Board's decision of a case within their geographic jurisdiction. Traditionally, the Board has acquiesced to the decision of the relevant Circuit Court in removal cases and viewed the decision as binding. *E.g.*, *Matter of L-G-*, 21 I&N Dec. 89 (B.I.A. 1995). Where different Circuits interpret a law differently, the Board will follow the precedent within the relevant Circuit. *E.g.*, *Matter of Ramos*, 23 I&N Dec. 336, 346-47 (B.I.A. 2002).

While general acquiescence by the Board to the Circuit's precedent occurs in the majority of cases, the Board has recognized that blind adherence to the Circuit is not always appropriate. Not every determination announced by a relevant Circuit Court calls for a binding precedential effect on the Board within the jurisdiction of the Circuit Court. The Board may, on occasion, decline to follow the relevant Circuit's guidance on a discrete issue. In *Matter of Mangabat*, the Board determined that cases may occur in which the Board concludes that non-acquiesce to a

Circuit Court's prior decision is appropriate. 14 I&N Dec. 75 (B.I.A. 1975). In its decision, the Board chose to follow the Attorney General's (AG) direct interpretation of the statute in question even though it conflicted with the Ninth Circuit's interpretation. *Id.* at 77. As a component of the Department of Justice (DOJ), the AG's determinations carry the force of law by which the Board is bound. *See id.* at 78 ("The construction . . . which we here apply is one which the Attorney General has approved, and his decision is binding on us."). Relying on the AG's prior determination, the Board declined to follow applicable Circuit precedent in favor of an interpretation that was consistent with not only the AG's regulation but with the majority of other Circuits who had already addressed the matter. *Id.* at 77.

Turning to the Third Circuit's decision in *Jeune v. Att'y Gen. of U.S.*, 476 F.3d 199 (3d Cir. 2007), the Board cannot rely on the principle in *Matter of Mangabat* as support because the AG has not specifically spoken on the issues addressed in *Jeune*. As *Matter of Mangabat* recognized, the Board may decline to acquiesce to a Circuit's decision when the AG has issued specific interpretation for the Board to follow. 14 I&N Dec. at 78. Regulations announced by the AG also carry the force of law and bind the Board to follow the rule announced. *Matter of Hilmer Leonel Cubor-Cruz*, 25 I&N Dec. 470, 471 (B.I.A. 2011). However the AG has neither issued specific guidance nor regulations that would prevent the Board from applying the Third Circuit's direction to determine whether the violation of a state statute is an aggravated felony.

The Board is thus bound by the analytical framework used in *Jeune*. The Third Circuit utilized the *Davis/Barrett* approach in *Jeune* to analyze § 780-113(a)(30). 476 F.3d at 201. The *Davis/Barrett* doctrine was initially developed by the Board and is considered the traditional framework used in aggravated felony determinations. *See Matter of Barrett*, 20 I&N Dec. 171 (B.I.A. 1990); *Matter of Davis*, 20 I&N Dec. 536 (B.I.A. 1992). Prior to its decision in *Jeune*,

the Third Circuit also applied the *Barrett/Davis* approach for other aggravated felony determinations. *See, e.g.*, *Garcia v. Att'y Gen. of U.S.*, 462 F.3d 287 (3d Cir. 2006); *Gerber v. Holmes*, 280 F.3d 297 (3d Cir. 2002). Because the Third Circuit utilized the Board's traditional *Davis/Barrett* approach in its determination, there is no reason for the Board in its present case to decline to follow *Jeune*.

While the Board is bound by *Jeune*, the precedent it established pertaining to Pa. Const., Stat. § 780-113(a)(30) does not prevent the Board from finding § 780-113(a)(30) to be an aggravated felony. While *Matter of Jeune* found an application of Pa. Const., Stat. § 780-113(a)(30) is not considered an aggravated felony, other Third Circuit decisions have found that conviction under section 30 constitutes an aggravated felony. *Compare Jeune*, 476 F.3d 199 (3d Cir. 2007) *with Garcia v. Att'y. Gen. of U.S.*, 462 F.3d 287 (3d 2006). This leaves ambiguity pertaining to the Board's interpretation of § 780-113(a)(30) and whether a conviction under the statute is an aggravated felony for purposes of the INA. The difference between the conflicting conclusions lies in the record and the specific facts available to the Circuit Court. *Compare Jeune*, 476 F.3d at 205 *with Garcia v. Att'y. Gen. of U.S.*, 462 F.3d at 289. Each panel relied on the charging instruments to determine if the conviction constituted an aggravated felony. The information derived from the charging instrument was then applied to the statute, allowing the Third Circuit to determine in each case whether the drug conviction constituted an aggregated felony.

The Board can find *Jeune* binding and still determine that § 780-113(a)(31) can constitute an aggravated felony. Pennsylvania criminalizes a violation of § 780-113(a)(31) as a misdemeanor. 35 Pa. Const., Stat. § 780-113(g). However, the state's penalty, whether punished as a felony or misdemeanor, is not dispositive for determining whether the conduct is an

aggravated felony. *Lopez v. Gonzales*, 549 U.S. 47, 59 (2006). The Court in *Lopez* examined the conduct that the State punished as a felony to decide if the state's categorization of the conduct as a felony automatically made it a felony under federal law. *Id.* at 52. The Court found that the state's punishment is irrelevant when determining if the conduct constituted a federal felony. *Id.* at 55-57. "The law of the convicting jurisdiction is not dispositive . . . [and] Congress [did not] authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers." *Id.* at 59. Therefore, the State's assignment of a misdemeanor punishment to § 780-113(a)(31) does not foreclose the Board from finding § 780-113(a)(31) an aggravated felony. A state offense may be considered an aggravated felony as long as the conduct is a felony under federal law. *See Lopez*, 549 U.S. at 59-60.

Therefore, a violation of § 780-113(a)(31) can constitute an aggravated felony depending upon the agency's definition of "small amount." The Third Circuit has left the Board with precedent pertaining to the framework for analysis under *Jeune* but with little direction on how that framework renders decisions unless facts from the charging documents are presented for consideration. To be consistent with *Jeune*, the Board should integrate the allowed documents to determine if the alien's conviction constitutes an aggravated felony.

B. Alternatively, the Board May Decline to Follow *Jeune* in the interpretation of § 780-113(a)(31) Because the Board Has Not Had the Opportunity to Determine if the Statute Is an Aggravated Felony Under the INA.

While the AG has not spoken directly on the application of Pennsylvania's criminal statutes or their applicability to INA § 101(a)(43)(B), DOJ has directed the Board to take a less deferential view of Circuit Court decisions following the Supreme Court decision in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 976, 982-983 (2005) [hereinafter *Brand X*]. In *Brand X*, the Supreme Court considered a conflict between an agency interpretation of a

statute and a Circuit Court's construction and interpretation of the same statute. *Id.* at 974-75. The *Brand* X Court applied the framework announced in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) to determine that a court cannot merely substitute its own preferred interpretation of a statute, but must give deference to an agency's interpretation. Unless Congress has clearly and unambiguously expressed the intent of the statute, the agency is charged with interpretation. *Id.* at 842-43. If the statute is ambiguous, the court must defer to the agency when the agency's interpretation "is based on a permissible construction of the statute." *Id.* at 843. A court's interpretation of a statute will trump an agency's interpretation only if the court concludes that the statute is unambiguous and warrants agency discretion in its interpretation. *Brand X*, 467 U.S. at 982. The *Brand X* decision concluded that under *Chevron*, ambiguities on a statutory scheme are better interpreted by the agency entrusted with enforcement of a regulation rather than a court. *Id.* at 980-81.

While *Brand X* dealt with statutory interpretation by the Federal Communication Commission wholly outside the realm of immigration law interpretation, DOJ has determined that the *Brand X* decision is applicable in the federal immigration enforcement context. On August 15, 2014, the DOJ posted on the its website specific guidance on the interpretation of *Brand X*, the appropriate level of deference given to agency determinations, and its *Brand X*'s applicability to agencies regulating immigration laws and policy.[1] Both *Brand X* and the *Agency Deference* policy guidance hold that a court's evaluation of an agency interpretation is not to necessarily provide the best interpretation possible, but merely ensure that the interpretation is lawful.

[1] *Agency Deference & Brand X*, DEPARTMENT OF JUSTICE, http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/agency-deference.pdf (last visited on Sept. 10, 2015) (hereinafter "*Agency Deference*"].

In addition to affirming the deferential judicial treatment of agency decisions, *Brand X* also addressed the need for deviations from past decisions even at the agency level. The Court recognized that an agency may have occasion to alter its analysis, thus making a prior decision inconsistent with the present. *Brand X*, 545 U.S. at 981. "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 981 (quoting *Chevron*, 534 U.S. at 863-864.) As a result, the Board may also find that it cannot properly interpret § 780-113(a)(31) within the confines of its past practices.

While DOJ policy guidance is not the same as an AG decision or regulation, the Board considers it persuasive as to whether to follow its own interpretation as the agency charged with enforcement of the INA. While the Third Circuit has addressed § 780-113(a)(30), its analysis has not rendered consistent precedent. The Third Circuit has not analyzed § 780-113(a)(31) either independently or in conjunction with an analysis of § 780-113(a)(30). Under *Brand X* and *Chevron*, the Board may need to depart from prior practices pertaining to § 780-113(a)(30) to analyze the interplay of it with § 780-113(a)(31) to determine if both are aggravated felonies. Therefore, the Board may find that the ends of justice require deviation from the Third Circuit's precedent or its own precedent to ensure a proper analysis of the current case.

C. The Board Is Not Bound by *Matter of Anselmo*, 20 I&N Dec. 25 (B.I.A. 1989) Because of How the Board and the Third Circuit Have Used It as Precedent Subsequent to Its Publication.

The Board's determination not to follow the AG's prior announcement pertaining to the interpretation of a statute does not require the Board to follow the Third Circuit's precedent in *Jeune*. While *Jeune* correctly held that the Board historically has acquiesced to the Circuit Court's interpretation of the relevant statute, the Board has not sacrificed its own position—

endorsed by the AG—to embrace a contrary position held by the Circuit Court. In fact, none of the cases *Matter of Anselmo* cites for the proposition that the Board has historically followed the Circuit Court's opinion were faced with a contrary position held by the AG or agency. *See Matter of Anselmo*, 20 I&N Dec. at 31.

The Third Circuit has never cited to *Matter of Anselmo* to support the proposition that a Circuit Court's contrary position should be favored over the Board's determination or the AG's regulations. *See Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001); *Clark v. INS*, 904 F.2d 172 (3d Cir. 1990). Without support from the Third Circuit or the Board itself to ignore Board precedent in favor of a Circuit Court's interpretation, the Board should not find *Matter of Anselmo* binding as to whether to follow *Jeune* in the current case.

D. The Third Circuit's Precedent Has Been Abrogated by the Supreme Court's Decision in *Moncrieffe v. Holder*

In the recent 2013 decision *Moncrieffe v. Holder*, the Supreme Court addressed the process for determining whether a state drug conviction was an aggravated felony under the INA. Relevant to this case, the INA defines an aggravated felon as "the illicit trafficking in a controlled substance." INA § 101(a)(43)(B). Unfortunately, the INA does not describe what conduct is considered to be trafficking, but instead directs the adjudicator to section 102 of the Controlled Substance Act and title 18, section 924(c) of the United States Code. 18 U.S.C. § 924(c)(2) defines a drug trafficking crime as "any felony punishable under the Controlled Substance Act." A felony is defined as an offense for which "the maximum term of imprisonment" is "more than one year." 18 U.S.C. 1559(a)(5). The relevant portion of the Act is § 841(D), which designates as a federal felony any conviction with a sentence of not more than 5 years involving less than 50 kilograms of marijuana. The statute also directs its reader to §

841(b)(4), to provide an exception to a conviction under § 841(D) for small amounts of marijuana distributed without remuneration. Convictions under § 841(b)(4) are considered simple possession misdemeanors and thus would not qualify as an aggravated felony. 21 U.S.C. 844(a).

In its decision, the Supreme Court advanced the categorical approach as the proper method of analysis over the Third Circuit's use of the *Davis/Barrett* framework. *Moncrieffe*, 133 S. Ct. at 1685. Following the Supreme Court's decision in *Moncrieffe*, the Third Circuit has been presented with occasion to decide whether to follow the categorical approach or to continue to use the *Davis/*Barrett approach. The Third Circuit has used *Moncrieffe* since its announcement by the Supreme Court in 2013 as the preferred method of analyzing whether a conviction qualifies as an aggravated felony under INA § 101(a)(43)(B). *See, e.g.*, *Mattie v. Att'y Gen. of U.S.*, 585 F. App'x 821 (3d Cir. 2014). The framework has thus become binding on the Board and has overridden the Third Circuit's decision in *Jeune*.

However, the framework announced in *Moncrieffe* must be altered to conform to later Supreme Court and Third Circuit precedent. Consideration of these issues will assist the Board in analyzing both subsections 30 and 31 of the Pennsylvania Code. Additionally, the Board should consider several arguments made by the Supreme Court in *Moncrieffe* that, when applied to the present case and Pennsylvania's statutory scheme, might warrant a different outcome than that of *Moncrieffe*.

1. The Board Should Use the Modified Categorical Approach to Determine if the Pennsylvania Statutes Are Aggravated Felonies.

The Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) addressed the categorical and modified categorical approach, and when each approach was appropriate to use. The modified categorical approach helps analyze a statute when it is

divisible. *Id.* at 2285. A statute is divisible when it "sets out one or more elements of an offense in the alternative" or "comprises multiple, alternative versions of the crime." *Id.* at 2282, 2284. While the *Moncrieffe* Court stated that they used the categorical approach to determine that the Georgia statute at issue was not an aggravated felony, the Court also made sure to mention the specific element of the statute on which the conviction rested and the quantity of marijuana Moncrieffe possessed at the time of arrest. *Moncrieffe,* 133 S. Ct. at 1683.

Subsequent to the Supreme Court's decisions in *Moncrieffe* and *Descamps*, the Third Circuit announced that 35 Pa. Const., Stat. § 780-113(a)(30) was divisible and therefore warranted an application of the modified categorical approach. *U.S. v. Somerville*, No. 14-3458, 2015 U.S. App. LEXIS 9894, at *5 (3d Cir. June 12, 2015). "[W]e have held that a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or some comparable judicial record of the factual basis for the plea." *Moncrieffe,* 133 S. Ct. at 1684 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009)) (internal quotation marks omitted). Doing so assists the Board in determining which elements of the statute were the basis for conviction. *Somerville*, 2015 U.S. App. LEXIS 9894, at *4-5. By using the modified approach and determining which elements form the basis for the alien's conviction in *Jeune*, the Board can better determine if the conviction under subsection 30 was an aggravated felony in violation of INA § 101(a)(43)(B).

In addition to following Circuit precedent relating to the proper method of analysis for subsection 30, the Board should also find section 31 divisible to determine if a conviction under the statute may constitute an aggravated felony. Section 31 states:

> Notwithstanding other subsections of this section, (i) the possession of a small amount of marihuana only for personal use; (ii) the possession of a small amount

> of marihuana with the intent to distribute it but not to sell it; or (iii) the distribution of a small amount of marihuana but not for sale.
>
> For purposes of this subsection, thirty (30) grams of marihuana or eight (8) grams of hashish shall be considered a small amount of marihuana.

35 Pa. Const., Stat. § 780-113(a)(31). The statute is divisible because it involves alternative actions or elements that may be considered a violation of the statute. Therefore, it would be appropriate for the Board to consider the charging documents, *etc.*, pertaining to the conviction. *Nijhawan*, 557 U.S. at 35.

The modified categorical approach will also assist the Board in clarifying its position on what is considered a small amount of marijuana. The *Moncrieffe* Court required that an aggravated felony finding involve either remuneration *or* more than a small amount of marijuana. 133 S. Ct. at 1693 (emphasis added); *see also Evanson v. Att'y Gen. of U.S.*, 550 F.3d 284, 289 (3d Cir. 2008). From the language of the Pennsylvania statute, a violation does not require remuneration. However, a violation of the statute may still involve more than a small amount of marijuana, which would render it an aggravated felony.

Section 31 defines a small amount of marihuana as 30 grams of marihuana or 8 grams of hashish. While this definition might provide the Commonwealth with the appropriate guidelines for determining prosecution, it does not automatically resolve how the Board interprets a small amount of marijuana for immigration law enforcement purposes. "Here, the statute itself provides no guidance on how 'small amount' should be interpreted." *Catwell v. Att'y Gen. of U.S.*, 623 F.3d 199, 208 (3d Cir. 2010). Neither the Board nor the Supreme Court has provided a definition of how much marijuana is considered a small amount to remove the conviction from classification as an aggravated felony under INA § 101(a)(43)(B).

The Supreme Court in *Moncrieffe* did not state what it considered to be a small amount of marijuana to trigger § 841(b)(4). The Court did reference N.Y. Penal Law Ann. § 221.35 (West 2008), which considers a small amount of marijuana to be two grams or less. *See id.* at 1689. The Court stated that this amount would fit within § 841(b)(4). The Board has found 30 grams to be "a useful guidepost" but has not held that this amount is definitively binding because situations may exist where 30 grams is *not* a small amount. *Matter of Castro Rodriguez*, 25 I&N 698, 703 (B.I.A. 2012). Recently, the Third Circuit has found that it cannot conclusively find 28.35 grams to be a small amount of marijuana, even when using the *Castro Rodriguez* decision as precedent. *See Mattie v. Att. Gen. of U.S.*, 585 F. App'x 821, 827 (3d Cir. 2014).

The Board can reference the legislative history to help determine the purpose of the section. "Senator Ted Kennedy, . . . observed that '[m]any youngsters may be in a situation where they are with friends, where they give a marihuana cigarette or a small quantity of marihuana to one or two others. . . .'" *Catwell*, 623 F.3d at 208 (quoting 116 Cong. Rec. 33,555 (1970)). The *Catwell* court determined that Congress intended "small amount" to be an amount of marijuana a person would use on a "single occasion." *Id.* at 209. The Board should heed the history of the section and consider a small amount of marijuana to be no more than a person would use on a single occasion. While 30 grams may be considered a helpful guidepost, it is far more than a person would use in a single marijuana cigarette on one occasion. The 2010 Federal Sentencing Guidelines state that .5 grams of marijuana go into a marijuana cigarette. (U.S. Sentencing Guidelines Manual § 2D1.1) (U.S. Sentencing Comm'n 2014)). Using this unit of measurement, 30 grams of marijuana would produce 60 marijuana cigarettes, far more than a person would use in a single use. *See Catwell*, 623 F.3d at 209. Therefore, the Board should conclude that Penn. Stat. § 780-113(a)(31)'s use of "small amount" does not automatically align

with the "small amount" referenced in § 841(b)(4) because 30 grams of marijuana does not constitute a small amount for federal purposes.

2. Statutory Ambiguity Should Be Left to Agency Interpretation, Not Automatically Interpreted in Favor of the Non-Citizen.

In the *Moncrieffe* decision, the Court evoked the doctrine that any ambiguities in the statutory construction and interpretation of the INA should be construed in favor of the alien. *Moncrieffe*, 133 S. Ct. at 1693. The Court recognized that some conduct does not fit plainly within the categorical approach and thus conduct that is actual trafficking may slip through the cracks of the statute. The Court preferred to under-include conduct rather than delve into the facts of a conviction, stating "we err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in favor of the non-citizen." *Id.* (citation omitted).

The *Moncrieffe* Court application of the "rule of lenity," however, is not applicable in the present case. The rule of lenity is a doctrine of last resort where traditional statutory interpretation cannot resolve an ambiguity. *Matter of Rocco Oppedisano*, 26 I&N Dec. 202, 206-207 (B.I.A. 2013) (citations omitted). In this case, any ambiguity of the term "small amount" can be resolved by statutory interpretation as demonstrated in section D.1. above.

3. Alternatively, If Board Should Find That the Existence of Subsection 31 in Pennsylvania Statute §780-113(a) Creates the Assumption That Subsection 30 Is an Aggravated Felony.

If the Board determines that the 30 gram measurement in § 780-113(a)(31) qualifies as a "small amount" for the purposes of 21 U.S.C. § 841(b)(4), the Board should still find that under *Moncrieffe*, a conviction under § 841(b)(4) is an aggravated felony. The Court phrased the question presented in *Moncrieffe* as "whether a conviction under a statute that criminalizes

conduct described by both § 841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to amount . . . is a conviction for an offence that 'proscribes conduct punishable as a felony under' the CSA." 113 S. Ct. at 1684 (citing *Lopez*, 549 U.S. at 60). The Georgia statute at issue in *Moncrieffe* did not have a "small amount" statute counterpart as Pennsylvania does so the Supreme Court was left with one statute that could either correspond to a felony or misdemeanor under the CSA. *See id.* at 1686. The Court differentiated between states that have a misdemeanor statute as well as a felony statute dependent upon remuneration and quantity. *Id.* at 1692.

The Court discussed the modified categorical approach's effect on the states that do not have a misdemeanor counterpart, and did not address state statutes that do. Having a state misdemeanor statute prevents the "possibility [] that the State would apply its statute to conduct that falls outside of the generic definition of a crime. *See id.* at 1693 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S.183, 193 (2007)). The interplay between § 780-113(a)(30) and (31) eliminates the *Moncrieffe* Court's concern that the statute would apply section § 780-113(a)(30) to crimes actually punishable under § 780-113(a)(31).

Reliance by the Board on *Walker v. Att'y Gen. of U.S.*, No. 14-1714, 2015 U.S. App. LEXIS 14488 (3d Cir. Aug. 18, 2015) is ill-advised. The *Walker* decision attempts to discuss the relationship between subsections 30 and 31, but fails to properly support the assertion that Pennsylvania would prosecute individuals under section 30 when the defendant's conduct was eligible for misdemeanor treatment under subsection 31. The Third Circuit states that it has held that distributing a small amount of marijuana could be prosecuted under subsection 30. *Id.* at *3 (citing *Evanson v. Att'y Gen. of the U.S.*, 550 F.3d 284, 289 (3d Cir. 2008); *Jeune v. Att'y Gen. of the U.S.*, 476 F.3d 199, 205 (3d Cir. 2007)). However neither of these opinions provides any

citations or case law to support this proposition. Neither even cites to subsection (31) within the decision.

The *Walker* court also attempts to support its assertion by stating that Pennsylvania has prosecuted an individual under subsection 30 when the conduct could also be prosecuted under subsection 16. However, the court does not provide any citation for this assertion. It is significant that the IJ, in his opinion in the present case, provided several Pennsylvania cases refuting the proposition that Pennsylvania would prosecute an individual under subsection 30 even though the person was eligible for misdemeanor treatment under subsection 31. (IJ Op., *4-5).

The *Moncrieffe* decision itself provides support for a statutory interpretation that would render conduct under § 780-113(a)(30) and (31) divergent. The language used in § 841(b)(1)(D) states " except as provided," while the statutory text in § 841(b)(4) states "[n]otwithstanding paragraph (1)(D)." The Supreme Court found that the use of the words "except" in one subsection and "notwithstanding" in the other meant that each was drafted "to be exclusive of the other." *Id.* at 1688. "These dovetailing provisions create two mutually exclusive categories of punishment for . . . marijuana distribution." *Id.* at 1681. In this case, § 780-113(a)(30) similarly uses the language "[e]xcept as authorized by this act," while § 780-113(a)(31) operates "[n]otwithstanding the other subsections of this section." The language used in the Pennsylvania Code is nearly identical to the introductory language used by the two federal statutes explained in *Moncrieffe*. It would seem illogical and contradictory to use the same language in the Pennsylvania statutory scheme as in the federal statutory scheme, but to then argue that Pennsylvania's statute's use creates overlapping provisions while the federal statutes creates two provisions that are completely independent of one another. Any apprehension the Board may

have that the conduct prosecuted under subsection 30 would overlap with subsection 31 is only a mere "theoretical possibility." *See Moncrieffe*, 133 S. Ct. at 1963 (quoting *Duenas-Alvarez*, 549 U.S. at 193).

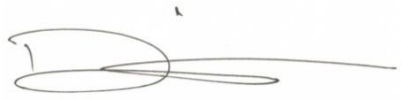
VI. CONCLUSION

The Third Circuit's precedent in *Jeune* is a binding decision upon the Board because the Third Circuit used the Board's traditional framework. But while acquiescence to Circuit precedent is typical, the amount of deference paid to the Third Circuit is dependent upon the Board's discretion. However, the *Jeune* decision did not provide the clarity required to render a decision in the present case that would uniformly apply to Pa. Const., Stat. §§ 780-113(a)(30) and (31). Therefore, the *Jeune* precedent does not prevent the Board from analyzing and making determinations about the laws and policies that Congress has charged it with implementing regarding whether convictions under these statutes constitute an aggravated felony.

While the Supreme Court's decision in *Moncrieffe* did abrogate *Jeune*, the Board should consider multiple arguments that would ensure a proper application of *Moncrieffe* on the matter pending before the Board. First, the Board should apply the modified categorical approach to both Pennsylvania statutes to ensure an alien's conviction is properly categorized as an aggravated felony. Additionally, this case presents the Board with an opportunity to not only continue to develop its case law under *Moncrieffe* but also to determine, without judicial interference, what amount constitutes a "small amount" of marijuana for the purposes of immigration law and how the Board defines an aggravated felony. The Board should find that 30 grams of marijuana is not a "small amount" under § 841(b)(4) because it is far more than one individual would use on one occasion. If, in the alternative, the Board finds Pa. Const., Stat. § 780-113(a)(31) is not an aggravated felony; the Board should hold that its interplay with Pa.

Const., Stat. § 780-113(a)(30) creates the presumption that Pa. Const., Stat. § 780-113(a)(30) is an aggravated felony.

Respectfully submitted,



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