Nos. 18-72990, 18-73218

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDUARDO VELASQUEZ-RIOS,
Petitioner,
v.
ROBERT M. WILKINSON, Attorney General,
Respondent

SANJAY JOSEPH DESAI, AKA SANJAY JOSEPH ANDREWS, AKA JOAO SERGIO KARAMANO SOVERANO, Petitioner,
v.
ROBERT M. WILKINSON, Attorney General,
Respondent

BRIEF OF AMICI CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AMERICAN IMMIGRATION COUNCIL, DETENTION WATCH NETWORK, IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION LITIGATION ALLIANCE, NORTHWEST IMMIGRANT RIGHTS PROJECT, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, WASHINGTON DEFENDER ASSOCIATION, SIX STATE PUBLIC DEFENDER OFFICES, LAW PROFESSORS & LAW SCHOOL CLINICS IN SUPPORT OF PETITIONERS' PETITIONS FOR REHEARING AND REHEARING EN BANC

ANDREW WACHTENHEIM
LEILA KANG
NABILAH SIDDIQUEE
Immigrant Defense Project
121 6th Avenue #6
New York, NY 10013
Phone: (212) 725-6421
E-mail: andrew@immdefense.org
Counsel for Amici Curiae

DISCLOSURE STATEMENTS

Pursuant to Fed. R. App. P. 26.1 and 29(c), amici curiae state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above.

Pursuant to Fed. R. App. P. 29(c)(5), amici curiae state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than amici curiae and their counsel contributed money that was intended to fund preparing or submitting the brief.

Pursuant to Ninth Circuit Rule 29-3, all parties consent to the filing of this brief.

TABLE OF CONTENTS

DISCLOSURE STATEMENTS i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT OF INTEREST OF *AMICI CURIAE* 1
INTRODUCTION AND RULE 35 STATEMENT 1
REASONS FOR GRANTING THE PETITION 5
I. The Panel's Decision Is Inconsistent with the Supreme Court's and this Court's Federalism Jurisprudence. 5
A. The relevant INA terms, interpreted through the federalism canon, compel the conclusion that Congress did not intend to detract from the States' authority to define criminal sentences. 5
B. The Panel's decision erred in effectively preempting the State law without Congressional authorization. 9
II. The Panel's Decision Eliminates Immigration Relief for Classes of Noncitizens Convicted of Single Misdemeanors in California, Creates Confusion and Unpredictability in State Court Systems, and Affects People of Color Almost Exclusively. 12
A. The Panel's decision reduces availability of three forms of discretionary relief for domestic violence survivors, longtime residents, and close relatives of U.S. citizens, and will be used to place lawful permanent residents in removal proceedings and immigration custody 12
B. The Panel's decision interferes with duties of prosecutors, defense attorneys, and judges in state courts, and with the rights of the criminally accused. 13
C. The Panel's decision disproportionately impacts Black, Latinx, and Asian immigrants. 15
CONCLUSION 17
CERTIFICATE OF COMPLIANCE 19
CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

Almanza-Arenas v. Lynch, 815 F.3d 469 (9th Cir. 2016) (en banc).....1
Arizona v. United States, 567 U.S. 387 (2012)..... 9, 10
Ayala v. Sessions, 855 F.3d 1012 (9th Cir. 2017).....9
Bolling v. Sharpe, 347 U.S. 497 (1954).....15
Bond v. United States, 134 S. Ct. 2077 (2014).....6
Brecht v. Abrahamson, 507 U.S. 619 (1993).....5
Chavez-Solis v. Lynch, 803 F.3d 1004 (9th Cir. 2015).....3
Gregory v. Ashcroft, 501 U.S. 452 (1991)..... 2, 6, 11
Heath v. Alabama, 474 U.S. 82 (1985).....6
Hylton v. Sessions, 897 F.3d 57 (2d Cir. 2018).....3
Kansas v. Garcia, 140 S. Ct. 791 (2020)..... 2, 5, 9, 10
Marinelarena v. Barr, 930 F.3d 1039 (9th Cir. 2019) (en banc).....1, 6
Mata v. Lynch, 135 S. Ct. 2150, 2153 (2015).....9
Mathis v. United States, 136 S. Ct. 2243 (2016).....6
Matter of Velasquez-Rios, 27 I. & N. Dec. 470 (BIA 2018)..... 3, 13, 16
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).....9
Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc).....2
Moncrieffe v. Holder, 569 U.S. 184 (2013).....3
Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).....1, 2
New York v. United States, 505 U.S. 144 (1992).....4, 8
Nixon v. Mo. Mun. League, 541 U.S. 125 (2004).....6
Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011) (en banc).....1
Padilla v. Kentucky, 559 U.S. 356 (2010)..... 1, 14
People v. Soriano, 194 Cal. App. 3d 1470 (Cal. 1987).....14
Pereida v. Barr, Sup. Ct. Docket No. 19-438 (Argued Oct. 14, 2020).....1
Planes v. Holder, 652 F.3d 991 (9th Cir. 2011).....7

Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 10
Raygor v. University of Minnesota, 534 U.S. 533 (2002) 6
Sessions v. Dimaya, 138 S. Ct. 1204 (2018) 1
United States v. California, 921 F.3d 865 (9th Cir. 2019) 11
Velasquez-Rios v. Barr, 979 F.3d 690 (9th Cir. 2020) ..... passim
Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019) 11
Washington v. Davis, 426 U.S. 229 (1976) 15
Wyeth v. Levine, 555 U.S. 555 (2009) 9, 10, 11

Constitutional Provisions

U.S. Const. art. I., § 9, cl. 1 4

Federal Statutes

28 U.S.C. § 46 2
8 U.S.C. § 1101(a)(27)(J) 15
8 U.S.C. § 1101(a)(48)(A) 3, 7
8 U.S.C. § 1101(a)(48)(B) 3, 7
8 U.S.C. § 1184(p)(1) 14
8 U.S.C. § 1227(a)(2)(A)(i)(I) 13
8 U.S.C. § 1227(a)(2)(A)(i)(II) 3, 7
8 U.S.C. § 1229a(c)(3) 7
8 U.S.C. § 1229b(b)(1) 12
8 U.S.C. § 1229b(b)(1)(C) 12
8 U.S.C. § 1229b(b)(2) 12
8 U.S.C. § 1229b(b)(2)(A)(iv) 12
8 U.S.C. § 1229b(c)(6) 9
8 U.S.C. § 1229b(c)(7) 9

8 U.S.C. § 1431(a)(3) 15

State Statutes

Cal. Penal Code § 1016.2 14
Cal. Penal Code §1016.5 14
Cal. Penal Code 17(a) 3
Cal. Penal Code 18 3
Cal. Penal Code 18.5(a) 3, 9, 10, 11

Rules

Fed. R. App. P. 26.1 i
Fed. R. App. P. 29(c) i
Fed. R. App. P. 29(c)(5) i
Fed. R. App. P. 32(a)(7)(C) 19
Fed. R. App. P. 35 2
Ninth Circuit Rule 29-3 i
Ninth Circuit Rule 32-1 19

Other Authorities

Adam Serwer, *Jeff Sessions's Unqualified Praise for a 1924 Immigration Law*, Atlantic, Jan. 10, 2017, https://bit.ly/3azWoiJ 16

Alina Das, *No Justice in the Shadows: How America Criminalizes Immigrants* (2020) 15, 16

Carl Lipscombe et al., *The State of Black Immigrants: Black Immigrants in the Mass Criminalization System* 20 (NYU Law Immigrant Rights Clinic and The Black Alliance for Justice Immigration 2016), http://stateofblackimmigrants.com/ 16

Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3rd ed. 2006) 15

Frederick Douglass, *Oration, Delivered in Corinthian Hall, Rochester* (Ed. Lee, Mann & Co., American Building 1852) 14

Ilya Somin, *Why the Migration or Importation Clause of the Constitution does not imply any general federal power to restrict immigration*, Wash. Post, Apr. 19, 2016, https://wapo.st/2MuKCxX 8

Jenny S. Martinez & Gordon Lloyd, National Constitution Center, *The Slave Trade Clause*, https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/761 8

Jia Lynn Yang, *One Mighty and Irresistible Tide: The Epic Struggle Over American Immigration, 1924-1965* (2020).....17

Josh Dawsey, *Trump derides protections for immigrants from 'shithole' countries*, Wash. Post, Jan. 12, 2018, https://wapo.st/3cEhora 17

Magee, R.V., *Slavery as Immigration?*, 44 U.S.F. L. Rev. 273 (2009) 8

Sam Stein & Amanda Terkel, *Donald Trump's Attorney General Nominee Wrote Off Nearly All Immigrants From an Entire Country*, Huffington Post, Nov. 19, 2016, https://bit.ly/3cBQuQH.....17

Southeast Asia Resource Action Center, *Automatic Injustice: A Report on Prosecutorial Discretion in the Southeast Asian American Community* (Oct. 2016), https://bit.ly/3jdX9BP 16

The Federalist No. 42 (James Madison) (Clinton Rossiter ed. 1961) 5

The Federalist No. 9 (Alexander Hamilton) (Clinton Rossiter ed. 1961) 8

W.E.B. Dubois, *An Appeal to the World: A Statement of Denial of Human Rights of Minorities . . .* (NAACP eds. 1947).....5

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are organizations of immigration and criminal law practitioners and professors who appear regularly before the U.S. Supreme Court, this Court, and Courts of Appeals on questions regarding the interplay of immigration and criminal law and its constitutional parameters. *See, e.g.*, *Pereida v. Barr*, Sup. Ct. Docket No. 19-438 (Argued Oct. 14, 2020); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001); *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc); *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (en banc); *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). *Amici* also regularly represent noncitizens in legal proceedings, are experienced in the day-to-day functioning of the immigration and criminal legal systems, and see the real-world impact of the decisions of the Board of Immigration Appeals ("BIA") and the Panel of this Court within the Ninth Circuit and nationally. *Amici* have a clear interest in the fair and proper application of the immigration and criminal laws of the United States, and in guarding against government and private discrimination against noncitizens based on race, national origin, and citizenship status.

INTRODUCTION AND RULE 35 STATEMENT

"Congress may impose its will on the States[,]" but "it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v.*

Ashcroft, 501 U.S. 452, 460-61 (1991) (internal quotation marks omitted). In 2017, California amended its criminal sentencing scheme. The changes reduced the maximum possible sentence for most misdemeanor offenses from one year to 364 days. The changes apply both prospectively and retroactively. Nearly a dozen states have enacted similar laws. The BIA declined to recognize the California law's retroactive application for immigration purposes. The Panel of this Court affirmed. As a result, in removal proceedings, the Panel's decision will mean that the maximum possible sentence for a past California misdemeanor conviction is one year, while in every other context the maximum possible sentence is 364 days.

The opinion of the Panel erodes the constitutional lines that "divide[] authority between federal and state governments for the protection of individuals" and reduce "risk of tyranny and abuse." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018) (internal quotation marks omitted). By abrogating the States' constitutionally ordained police powers without authorization by "constitutional text, federal statute, or treaty," *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020), the Panel's decision is inconsistent with the Supreme Court's and this Court's federalism jurisprudence. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (citing 28 U.S.C. § 46; Fed. R. App. P. 35). Congress wrote the Immigration and Nationality Act ("INA") to be "dependent on certain prior state convictions," and on the States to define the contours of their convictions and

sentences. *Moncrieffe v. Holder*, 569 U.S. 184, 218 (2013) (Alito, J., dissenting); *cf. Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009-10 (9th Cir. 2015), *accord Hylton v. Sessions*, 897 F.3d 57, 63-64 (2d Cir. 2018) (collecting cases). The relevant INA terms, understood through the rules of statutory interpretation, make explicit that Congress did not intend to preempt or supersede the States' powers to establish sentencing maximums under their criminal laws.

The relevant INA terms are: 8 U.S.C. §§ 1101(a)(48)(A) ("conviction"), 1101(a)(48)(B) ("sentence"), and 1227(a)(2)(A)(i)(II) ("convicted of a crime for which a sentence of one year or longer may be imposed"). The operative provisions of the California Penal Code are sections 17(a), 18, and 18.5(a). The BIA decision did not once address the INA terms "conviction" or "sentence," which are clearly relevant to interpreting congressional understanding of the effect of a State amendment affecting the conviction and sentence at issue here, as exemplified by the fact that the decision uses these terms over 50 times. *Matter of Velasquez-Rios*, 27 I. & N. Dec. 470, 472-73 (BIA 2018). The Panel's decision also rested on just one half of 8 U.S.C. § 1227(a)(2)(A)(i)(II), *Velasquez-Rios v. Barr*, 979 F.3d 690, 694 (9th Cir. 2020), and like the BIA's decision, the Panel's decision failed to address the statutory definitions of "conviction" and "sentence," 8 U.S.C. §§ 1101(a)(48)(A), (B). The Board's and the Panel's decisions misidentified the relevant statutory terms and, consequently, congressional intent.

See New York v. United States, 505 U.S. 144, 194 (1992) (White, J., concurring in part and dissenting in part) ("failure to properly characterize" the "legislation" affected the analysis of its "constitutionality").

The relevant statutory terms, taken together, communicate that Congress did not intend to preempt or detract from the States' rights to define their criminal law judgments and sentences for the purposes of the penal or other consequences of the State's chosen disposition of a criminal case. The decision of the Panel will lead to deportations and denials of immigration relief that Congress did not authorize, including noncitizens recently granted lawful permanent resident status, victims of domestic violence, and longtime residents with close U.S. citizen family ties. The detrimental consequences of the Panel's opinion, furthermore, will almost exclusively impact Black, Latinx, and Asian immigrants. It will prevent actors in state court systems—criminal defendants, criminal defense lawyers, prosecutors, and judges—from relying on settled federalist norms and statutory meaning to appropriately advise noncitizens on the immigration consequences of state convictions and sentences, as the Supreme Court requires. Alarmingly, in attempting to justify preempting the California statute, the Panel's opinion cites the Constitution's Migration and Importation Clause as a source of "sweeping" federal authority over immigration. *Velasquez-Rios*, 979 F.3d at 697 (citing U.S. Const. art. I., § 9, cl. 1). Constitutional scholars throughout history—James Madison,

W.E.B. Dubois, modern day law professors—agree that this clause concerns the dark history of division of power over slavery regulation, and has nothing to do with immigration. The Federalist No. 42, at 235 (James Madison) (Clinton Rossiter ed. 1961) ("Attempts have been made to pervert this clause into an objection against the Constitution by representing it . . . as calculated to prevent voluntary . . . emigrations. . . . I mention these misconstructions not with a view to give them an answer, for they deserve none. . . ."); W.E.B. Dubois, *An Appeal to the World: A Statement of Denial of Human Rights of Minorities* . . . (NAACP eds. 1947) (reflecting Dr. Dubois's opinion that the clause applies to slavery, and nothing else).

Amici respectfully urge this Court to rehear these cases en banc to correct the Panel decision's grave errors.

REASONS FOR GRANTING THE PETITION

I. The Panel's Decision Is Inconsistent with the Supreme Court's and this Court's Federalism Jurisprudence.

A. The relevant INA terms, interpreted through the federalism canon, compel the conclusion that Congress did not intend to detract from the States' authority to define criminal sentences.

In our federal system, "[t]he States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *see Kansas*, 140 S. Ct. at 806 ("From the beginning of our country, criminal law

enforcement has been primarily a responsibility of the States[.]"). At the center of the States' police powers is the authority "to determine what shall be an offense against its authority and to punish such offenses[.]" *Heath v. Alabama*, 474 U.S. 82, 89 (1985); *see also Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity."). For Congress to constrain the State's power to define its criminal law, its intention to do so must be "unmistakably clear in the language of the statute." *Raygor v. University of Minnesota*, 534 U.S. 533, 544 (2002) (internal quotation marks omitted). This federalism canon requires that federal legislation be "read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140-41 (2004); *Gregory*, 501 U.S. at 460-61 (noting the "requirement of clear statement" in "traditionally sensitive areas, such as legislation affecting the federal balance").

The Supreme Court and this Court for decades have recognized that Congress requires immigration adjudicators to defer to the States to identify the nature and scope of a prior conviction or sentence for immigration purposes. *See Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (explaining that state law defines the elements of a conviction); *Marinelarena*, 930 F.3d at 1044-45 (reviewing state criminal court documents and records to identify elements of

conviction); 8 U.S.C. § 1229a(c)(3) (documents and records produced by a convicting court establish conviction and sentence). This continues to be the case in light of the statutory terms "conviction" and "sentence." The INA defines "conviction" as a "formal judgment of guilt." 8 U.S.C. § 1101(a)(48)(A); *see Planes v. Holder*, 652 F.3d 991, 994-95 (9th Cir. 2011). The "sentence" is defined "to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B). The final operative words at 8 U.S.C. § 1227(a)(2)(A)(i)(II) read: "is convicted of a crime for which a sentence of one year or longer may be imposed." These terms and their definitions show that Congress meant for immigration consequences to turn on State judgments, sentences, and sentencing schemes under State law. Thus the plain language reflects that with respect to state criminal sentences, Congress intended the INA to function according to federalist norms by leaving the States' police powers undisturbed and respecting the State's final disposition of the criminal case under the State's law.

The Panel's decision cites to broad constitutional principles to override California's law, but these are plainly insufficient. And by doing so, the decision not only fails to give due respect to the States' police powers but it overlooks the Constitution's Tenth Amendment's general reservation of powers to the States and

limitations on the federal government's power over the States. *See New York*, 505 U.S. at 156-157. The Panel's decision even includes a reference to the Constitution's Migration and Importation Clause, a clause that "had nothing to do with immigration" and was about human slavery. Magee, R.V., *Slavery as Immigration?*, 44 U.S.F. L. Rev. 273, 288 (2009) (internal quotation marks omitted)[1]. It wrongly subordinates the States' rights to national sovereignty, missing Alexander Hamilton's declaration that "the State governments" are "constituent parts of the national sovereignty" and that this concept "fully corresponds, in every rational import of the terms, with the idea of a federal government." The Federalist No. 9, at 44 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

The Panel's decision describes concerns over inconsistency in immigration adjudications, but these are counterfactual and misunderstand the immigration system. *Velasquez-Rios*, 979 F.3d at 695. The California sentencing law means that the terms and consequences of a single California misdemeanor CIMT conviction

[1] *See also* Jenny S. Martinez & Gordon Lloyd, National Constitution Center, *The Slave Trade Clause*, https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/761 (last visited Jan. 24, 2021) (explaining that the Clause "is no longer constitutionally relevant since it expired in 1808" and has been "constitutionally inoperative for over 200 years[.]"); Ilya Somin, *Why the Migration or Importation Clause of the Constitution does not imply any general federal power to restrict immigration*, Wash. Post, Apr. 19, 2016, https://wapo.st/2MuKCxX (last visited Jan. 24, 2021).

are the same for every defendant, regardless of the date of conviction. Cal. Penal Code § 18.5(a). For noncitizens already denied immigration benefits or deported based on past conviction and sentencing schemes that have been modified, Congress has provided measures to reopen removal proceedings where appropriate. *See* 8 U.S.C. §§ 1229b(c)(6)-(7); *Mata v. Lynch*, 135 S. Ct. 2150, 2153 (2015); *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017). By contrast, the Panel's decision creates irregularity and inconsistency across state and federal proceedings, with noncitizens with pre-reform convictions suffering harsh immigration consequences, and noncitizens with post-reform convictions spared.

B. The Panel's decision erred in effectively preempting the State law without Congressional authorization.

The Panel's decision effectively preempts state law and conflicts directly with the Supreme Court's decisions in *Kansas v. Garcia*, 140 S. Ct. 791 (2020), *Arizona v. United States*, 567 U.S. 387 (2012), and *Wyeth v. Levine*, 555 U.S. 555 (2009). "In all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). Here, Congress has given no such indication.

The California sentencing law at issue states:

> Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days. This section shall apply retroactively, whether or not the case was final as of January 1, 2015.

Cal. Penal Code § 18.5(a) (West 2019). In declining to give effect to this statute, the Panel claimed that "preemption is not at issue" because its decision "has no bearing on whether California may, for purposes of its own state law, retroactively reduce the maximum sentence available for misdemeanor convictions"; yet the Panel expressly held: "we decline to give retroactive effect to the California statute." *Velasquez-Rios*, 979 F.3d at 695-96. This is preemption. No constitutional text or federal statute authorizes preemption in this case. *See Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp*., 485 U.S. 495, 503 (1988) ("There is no federal pre-emption in vacuo[.]").

The "Supremacy Clause . . . requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text." *Wyeth*, 555 U.S. at 586-587 (Thomas, J., concurring). That is not the case here: Congress did not enact an express preemption provision, state criminal sentencing is not "a field that Congress . . . has determined must be regulated by its exclusive governance," and the California law does not "conflict with federal law." *Arizona*, 567 U.S. at 399; *see Kansas*, 140 S. Ct. at 807 ("[T]he possibility that federal enforcement priorities might be upset is not enough to

provide a basis for preemption."). The requirements for federal preemption are wholly absent.

The treatment of state convictions and sentences in immigration law is a quintessential example "where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth*, 555 U.S. at 575 (internal quotation marks omitted). In such a circumstance, the "case for federal pre-emption is particularly weak[.]" *Id.*; *but see Velasquez-Rios*, 979 F.3d at 695 ("We decline to give retroactive effect to the California statute . . . where it appears that the purpose of that state-law amendment is to circumvent federal law."). "Invoking some brooding federal interest or appealing to a . . . policy preference should never be enough to win preemption of a state law[.]"). *Virginia Uranium, Inc. v. Warren,* 139 S. Ct. 1894, 1901 (2019) (lead opinion of Gorsuch, J.)

"[I]t is a state's historic police power—not preemption—that we must assume, unless clearly superseded by federal statute." *United States v. California*, 921 F.3d 865, 887 (9th Cir. 2019). The INA does not preempt California Penal Code § 18.5(a), and the Panel's decision was wrong to override the federalist balance. *See Gregory*, 501 U.S. at 460 ("[I]t is incumbent upon the federal courts to be certain of Congress' intent[.]").

II. The Panel's Decision Eliminates Immigration Relief for Classes of Noncitizens Convicted of Single Misdemeanors in California, Creates Confusion and Unpredictability in State Court Systems, and Affects People of Color Almost Exclusively.

A. The Panel's decision reduces availability of three forms of discretionary relief for domestic violence survivors, longtime residents, and close relatives of U.S. citizens, and will be used to place lawful permanent residents in removal proceedings and immigration custody.

Congress created a form of cancellation of removal under the Violence Against Women Act, commonly known as VAWA cancellation, for noncitizens who have been "battered or subjected to extreme cruelty by a spouse or parent." *See* 8 U.S.C. § 1229b(b)(2). The Panel's decision disqualifies from eligibility otherwise qualified noncitizens convicted of a single California CIMT misdemeanor prior to January 2015, because a maximum possible sentence of one year is disqualifying even if no jailtime was actually imposed. *See* 8 U.S.C. § 1229b(b)(2)(A)(iv).

The Panel's decision also disqualifies eligibility for a second form of cancellation of removal for noncitizens like Mr. Desai and Mr. Velasquez Rios who have lived in the United States for over ten years and have U.S. citizen or lawful permanent resident children, spouses, or parents who would suffer "exceptional and extremely unusual hardship" if they were removed. *See* 8 U.S.C. §§ 1229b(b)(1); (b)(1)(C).

Finally, in several unpublished individual cases[2], the BIA has extended the reach of *Matter of Velasquez-Rios* to find lawful permanent residents deportable if they have been convicted of a single CIMT misdemeanor within their first five years of admission to the United States (*see* 8 U.S.C. § 1227(a)(2)(A)(i)(I)). For example, a client of amici, D.G., is a young Jamaican lawful permanent resident who moved to the United States with his family when he was in high school. A few years later, during a period of homelessness he was charged with stealing money from his employer. He pleaded guilty to a misdemeanor offense and was sentenced to probation, with no jail time. U.S. Immigration and Customs Enforcement ("ICE") arrested and detained him and initiated removal proceedings based on the conviction. While his proceedings were ongoing, a New York court reduced the sentencing maximum in his case to 364 days under a sentencing reform law. The Immigration Judge applied *Matter of Velasquez-Rios* to find his conviction to carry a one year sentence, and found him deportable. He was detained for over one year during his case, and was then granted alternative relief.

B. The Panel's decision interferes with duties of prosecutors, defense attorneys, and judges in state courts, and with the rights of the criminally accused.

[2] Emails on file with undersigned counsel.

Federal and state laws require that defense counsel provide specific, individualized advice to noncitizen defendants regarding immigration consequences. Failure to do so amounts to ineffective assistance of counsel and violates federal and state constitutional and statutory rights. *See Padilla*, 559 U.S. at 373-74; *see also People v. Soriano*, 194 Cal. App. 3d 1470, 1482 (Cal. 1987); Cal. Penal Code § 1016.2 (West 2019). Judges and prosecutors must also act in a manner that is cognizant of relevant interplay with federal immigration law. *See Padilla*, 559 U.S. at 373; *see also* Cal. Penal Code §§ 1016.2, 1016.5.

These court system stakeholders rely on state laws to be properly interpreted so they can appropriately and competently handle state court matters, and advise their clients, witnesses, and people appearing before them. By declining to give effect to the California law's express language, the Panel's opinion frustrates the cardinal rule that law must be comprehensible and interpreted through "well-established" and "plain, common-sense rules" of statutory interpretation. Frederick Douglass, *Oration, Delivered in Corinthian Hall, Rochester* (Ed. Lee, Mann & Co., American Building 1852). The Panel's decision creates uncertainty regarding when a federal statutory scheme will recognize state statutes, and it heightens the risk that immigration authorities will decline to recognize state law in additional contexts where federal immigration law depends on state law determinations. *See, e.g.*, 8 U.S.C. § 1184(p)(1) (nonimmigrant visa dependent on state and local law

determinations); *id.* § 1101(a)(27)(J) (special immigrant juvenile visa dependent on juvenile court finding); *id.* § 1431(a)(3) (derivative citizenship dependent on legal and physical custody of child).

C. The Panel's decision disproportionately impacts Black, Latinx, and Asian immigrants.

The Fifth Amendment's Due Process Clause "prohibit[s] the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 669 (3rd ed. 2006) ("Obviously, it would be unacceptable to allow the federal government to discriminate based on race . . . in a manner prohibited the states."). The Panel's decision will almost exclusively impact people of color, who are disproportionately represented in state criminal legal systems and in immigration proceedings where convictions are at issue.

"Black people are more likely than any other group in the United States to be arrested, convicted, and imprisoned in the criminal enforcement system." Alina Das, *No Justice in the Shadows: How America Criminalizes Immigrants* 85 (2020) (hereinafter "No Justice"). "Black immigrants make up only 7.2% of the unauthorized population in the U.S.," but "over 20% of all immigrants facing deportation on criminal grounds." Carl Lipscombe et al., *The State of Black Immigrants: Black Immigrants in the Mass Criminalization System* 20 (NYU Law

Immigrant Rights Clinic and The Black Alliance for Justice Immigration 2016), http://stateofblackimmigrants.com/.

Seventy-eight percent of Southeast Asian Americans in removal proceedings "face deportation because of old criminal convictions[,]" "while 29% of other immigration deportations are based on old convictions." Southeast Asia Resource Action Center, *Automatic Injustice: A Report on Prosecutorial Discretion in the Southeast Asian American Community* 3 (Oct. 2016), https://bit.ly/3jdX9BP; *see also* Das, *No Justice* at 84 (As a result of the "school-to-prison pipeline," youth in Cambodian, Vietnamese, and Laotian refugee communities are "three to five times more likely to face deportation than other immigrant groups.").

One study of the "Criminal Alien Program" found that 92.5 percent of individuals deported through the program were from Mexico, Honduras, Guatemala, and El Salvador, "even though people from those countries make up less than half the noncitizen population in the United States." *Id.* at 83.

The Board issued *Matter of Velasquez-Rios* when Donald J. Trump was President of the United States and Jefferson B. Sessions, III was the Attorney General of the United States. Both of these actors displayed proven racial animus toward immigrants from majority-Latinx and majority-Black countries.[3]

[3] *See* Adam Serwer, *Jeff Sessions's Unqualified Praise for a 1924 Immigration Law*, Atlantic, Jan. 10, 2017, https://bit.ly/3azWoiJ (quoting then-Attorney General

CONCLUSION

The Panel's opinion is irreconcilable with the Supreme Court's and this Court's preemption and federalism decisional law, and this Court should grant en banc rehearing to reconsider these issues of exceptional importance.

Date: February 4, 2021

Respectfully submitted,

/s/Andrew Wachtenheim
ANDREW WACHTENHEIM
LEILA KANG
NABILAH SIDDIQUEE
Immigrant Defense Project

Sessions: "In seven years we'll have the highest percentage of Americans, nonnative born, since the founding of the Republic. Some people think we've always had these numbers, and it's not so, it's very unusual, it's a radical change. When the numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly[.]"). The "1924 law" to which then-Attorney General Sessions was referring "had instituted a system of ethnic quotas so stringent that large-scale immigration was choked off for decades . . . [i]n order to keep America white, Anglo-Saxon, and Protestant." Jia Lynn Yang, *One Mighty and Irresistible Tide: The Epic Struggle Over American Immigration, 1924-1965* 2 (2020). *See also* Sam Stein & Amanda Terkel, *Donald Trump's Attorney General Nominee Wrote Off Nearly All Immigrants From an Entire Country*, Huffington Post, Nov. 19, 2016, https://bit.ly/3cBQuQH (quoting then-Attorney General Sessions' 2006 speech on the U.S. Senate Floor: "Fundamentally, almost no one coming from the Dominican Republic to the United States is coming here because they have a provable skill that would benefit us and that would indicate their likely success in our society."); Josh Dawsey, *Trump derides protections for immigrants from 'shithole' countries*, Wash. Post, Jan. 12, 2018, https://wapo.st/3cEhora (reporting that President Trump, in response to lawmakers' discussion of protecting immigrants from Haiti, El Salvador and African countries, stated, "Why are we having all these people from shithole countries come here?").

121 6th Avenue #6
New York, NY 10013
Phone: (212) 725-6421
E-mail: andrew@immdefense.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 3,985 words.

Dated: February 4, 2021

/s/Andrew Wachtenheim
ANDREW WACHTENHEIM
Counsel for Amici

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2021 the foregoing document:

BRIEF OF AMICI CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AMERICAN IMMIGRATION COUNCIL, DETENTION WATCH NETWORK, IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION LITIGATION ALLIANCE, NORTHWEST IMMIGRANT RIGHTS PROJECT, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, WASHINGTON DEFENDER ASSOCIATION, SIX STATE PUBLIC DEFENDER OFFICES, LAW PROFESSORS & LAW SCHOOL CLINICS IN SUPPORT OF PETITIONERS' PETITIONS FOR REHEARING AND REHEARING EN BANC

was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Andrew Wachtenheim
ANDREW WACHTENHEIM
Counsel for Amici

APPENDIX A:

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amicus **American Immigration Council** is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council regularly litigates and advocates around issues involving the intersection of criminal and immigration law.

Amicus **American Immigration Lawyers Association** ("AILA"), founded in 1946, is a non-partisan, nonprofit national association of more than 15,000 attorneys and law professors who practice and teach immigration law. AILA members represent U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis, as well as providing continuing legal education, professional services, and information to a wide variety of audiences. AILA has participated as amicus curiae in numerous cases before the U.S. Courts of Appeal and the U.S. Supreme Court.

With some 4,000 members, amicus **California Public Defenders Association** ("CPDA") is the largest criminal defense organization in California and one of the largest in the world. CPDA provides training on criminal law and immigration practice and maintains a legislative lobbying presence and, through its Amicus Committee, is active in the development of California case law and statutory interpretation.

Amicus **Detention Watch Network** ("DWN") is a coalition of approximately 200 organizations and individuals concerned about the impact of immigration detention on individuals and communities in the United States. Founded in 1997, DWN has worked for nearly two decades to fight abuses in detention, and to push for a drastic reduction in the reliance on detention as a tool for immigration enforcement. DWN members are lawyers, activists, community organizers, advocates, social workers, doctors, artists, clergy, students, formerly detained immigrants, and affected families from around the country. They are engaged in individual case and impact litigation, documenting conditions violations, local and national administrative and legislative advocacy, community organizing and mobilizing, teaching, and social service and pastoral care. Through its policy and organizing work, DWN continues to advocate for immigrant justice and for the end of arbitrary detention.

Amicus **Immigrant Defense Project** ("IDP") is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that

may affect the rights of immigrants at risk of detention and deportation based on past criminal charges.

Amicus **National Immigration Litigation Alliance** ("NILA") is a non-profit organization that seeks to realize systemic change in the immigrants' rights arena through federal court litigation. NILA engages in impact litigation to extend the rights of noncitizens and to eliminate systemic obstacles they or their counsel routinely face. In addition, NILA builds the capacity of social justice attorneys to litigate in federal court by co-counseling individual federal court cases and by providing strategic advice and assistance to its members. NILA and its members are acutely aware of the serious long-term consequences that the panel's refusal to recognize state decriminalization and criminal system reform would have on immigration cases.

Amicus **Northwest Immigrant Rights Project** ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. As part of that work, NWIRP provides direct representation to more than 3,200 low-income immigrants in removal proceedings every year, including a significant number of individuals detained at the Northwest Detention Center in Tacoma, Washington. NWIRP appears frequently before the U.S. Court of Appeals for the Ninth Circuit in cases that seek to advance and protect the rights of immigrants in the United

States. NWIRP also provides direct representation, workshops, and legal advice to low-income immigrants seeking immigration benefits, including citizenship, and lawful or protected status for survivors of domestic violence, human trafficking, and other violent crime and persecution.

Amicus **Washington Defender Association** ("WDA") is a statewide non-profit membership organization of public defender agencies, indigent defenders and those working to improve the quality of indigent defense in Washington State. WDA provides expertise to defenders to ensure high quality legal representation, educates defenders, and collaborates with the community and other justice system stakeholders to advance systemic reforms. In 1999, WDA established our Immigration Project to focus on reducing the immigration consequences to noncitizens of criminal legal system involvement. WDA has provided amicus briefs in support of cases at all levels of state and federal courts, including this Court.

Amicus **Jayashri Srikantiah** is **Professor of Law & Director, Immigrants' Rights Clinic, Stanford Law School** (for identification purposes only.

Amicus **Michael J. Wishnie,** co-directs the **Worker & Immigrant Rights Advocacy Clinic, Yale Law School** (for identification purposes only), in which he

and his students and colleagues represent individuals in removal and detention proceedings and organizations dedicated to advancing immigrant rights. For the past several years, the clinic has represented one client in state legislative advocacy to enact a 364-day law in Connecticut.

Amicus **Philip L. Torrey, Harvard Law School Crimmigration Clinic** (for identification purposes only). As a longtime immigration practitioner and scholar, I have an interest in ensuring that our country's immigration laws are fairly and accurately applied.

Amicus **Bill Ong Hing, Professor** is **Director of the Immigration and Deportation Defense Clinic, and Dean's Circle Scholar, University of San Francisco** (for identification purposes only).

Amicus **Kathryn O. Greenberg Immigration Justice Clinic, Benjamin N. Cardozo School of Law** is a non-profit clinic dedicated to providing quality legal representation for indigent immigrants facing deportation and advocacy work to support immigrant communities. Immigration Justice Clinic students have won relief for many individuals facing deportation, and their work has helped change laws and policies affecting immigrants in New York and nationally.

Amicus **U.C. Davis School of Law Immigration Law Clinic** provides trainings and advice to public defenders and noncitizens charged with crimes. We

also provide free legal defense for immigrants in removal proceedings, many of whom who are convicted of criminal offenses for which we seek post-conviction relief.

Amicus **U.C. Irvine School of Law Immigrant Rights Clinic** is a law clinic providing pro bono legal services to immigrants facing deportation. The Clinic also partners with community and legal advocacy organizations on policy and litigation projects to advance immigrants' rights and immigrant workers' rights. Among the Clinic's clients are noncitizens who have obtained post-conviction relief under California law.

Amicus **Alameda County Public Defender's Office** provides legal services to people charged with crimes in Alameda County who are unable to afford an attorney, and represents approximately 26,000 people annually. In 2014, the Alameda County Public Defender became the first public defender office in California to implement a deportation defense unit to provide critical immigration legal services to clients in need. The Unit is comprised of 6 removal defense attorneys and 1 legal secretary and takes on complex deportation cases involving individuals once impacted by the criminal legal system, and then by the immigration system. In addition to advising over 100 public defenders on the immigration consequences of criminal convictions, the Unit represents individuals before Immigration Courts, the Department of Homeland Security, the Board of

Immigration Appeals, and the U.S. Court of Appeals for the Ninth Circuit. This includes cases where post-conviction relief provides grounds to terminate, re-open, and/or remand for relief from removal. The Unit also directly represents individuals seeking to vacate prior convictions that trigger severe immigration consequences before state courts and individuals challenging the constitutionality of actions by the Department of Homeland Security and the Department of Justice before U.S. District Courts.

Amicus **Brooklyn Defender Services** ("BDS") is a public defender organization that represents nearly 30,000 low-income residents of Brooklyn and elsewhere each year in criminal, family, civil, and immigration proceedings, providing interdisciplinary legal and social services since 1996. Since 2009, BDS has counseled or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, and advisals, as well as immigration consequence consultations in Brooklyn's criminal court system. Since 2013, BDS has represented more than 1,500 detained immigrants in deportation defense in immigration court and federal habeas corpus litigation through the New York Immigrant Family Unity Project, the first-in-the-nation assigned counsel program for detained immigrants.

Amicus **Los Angeles County Public Defender's Office** is the largest criminal defense organization in California. Its clients comprise a great many of

the individuals whose rights will be determined by the decision at issue in the petition at bar. Indeed, this office has a dedicated unit specializing in asserting and protecting the legal rights of non-citizens involved in the criminal legal system, whose attorneys constantly consider or invoke Penal Code section 18.5 in formulating immigration-sensitive dispositions, and in pursuing post-conviction relief.

Amicus **San Francisco Public Defender's Office** provides legal services to people charged with crimes committed in San Francisco who are unable to afford an attorney, and represents approximately 25,000 people annually. In 2017, the San Francisco Public Defender launched the Immigration Defense Unit, which provides complex deportation defense to individuals facing deportation in the San Francisco Immigration Court, but unable to afford an attorney in their removal proceedings. The Immigration Defense Unit employs eight attorneys and five support staff, and handles approximately 200 deportation cases each year, many who are detained as a result of a prior criminal conviction.

Amicus **Santa Clara County Public Defender's Office** provides legal services to people subject to civil commitment or charged with crimes committed in Santa Clara County who are unable to afford an attorney. In 2016, the Santa Clara County Public Defender's Office formed its Immigration Unit. The Unit employs two immigration attorneys, one paralegal, and one legal clerk. The Unit

advises on immigration consequences of pleas and advises on post-conviction relief, in addition to representing clients in post-conviction relief motions. The Unit provides immigration representation in applications for benefits such as naturalization, employment authorization, adjustment of status, and Deferred Action for Childhood Arrivals. The Unit often provides this representation after an old removal order has been reopened after post-conviction relief was obtained for the client. The Unit provides representation in removal cases before the Executive Office of Immigration Review and the Board of Immigration Appeals where post-conviction relief provides grounds to terminate, re-open, and/or remand for relief from removal.

Amicus law office of the **Ventura County Public Defender** defends indigent persons accused of crimes in one of California's largest counties. The County of Ventura, California, has a significant agricultural footprint in the state and many of the Public Defender's clients are farm workers and noncitizens who are threatened with immigration consequences should they be jailed or suffer a criminal conviction.