NON-DETAINED

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

In the Matter of: [redacted] **a/k/a** [redacted]	)	
	)	**File No: A** [redacted]
In removal proceedings	)	

REQUEST TO APPEAR AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Tiffany Lieu
Amanda Madigan, *Supervised Law Student*
Rachel Cohen, *Supervised Law Student*
Crimmigration Clinic
Harvard Immigration and Refugee
Clinical Program
6 Everett Street, WCC 3106
Cambridge, MA 02138
Phone: 617-496-5497
Fax: 617-495-8595

Andrew Wachtenheim
Nabilah Siddiquee
Immigrant Defense Project
P.O. Box 1765
New York, NY 10027
Phone: 212-725-6421

Counsel for Amici Curiae

MOTION/REQUEST TO APPEAR AS AMICI AND INTERESTS

Pursuant to 8 C.F.R. § 1292.1(d), the Crimmigration Clinic within the Harvard Immigration and Refugee Clinical Program at Harvard Law School ("Harvard Crimmigration Clinic"), along with the Immigrant Defense Project ("IDP") (collectively, "Proposed Amici Curiae"), respectfully request leave to appear as Amici Curiae and to file the accompanying amicus brief.

Proposed Amici Curiae have expertise on the immigration consequences of criminal convictions. Proposed Amici Curiae have represented noncitizens with criminal convictions in their immigration proceedings and therefore have experience concerning the practical applications of immigration law. In addition, they have produced scholarship in the crimmigration field, including on the conviction definition question at issue in the instant proceedings, and have filed briefs as amicus curiae in cases before the U.S. Supreme Court, the federal courts of appeals, the Board of Immigration Appeals ("Board"), and various international tribunals. Proposed Amici Curiae have expertise on and direct interest in the outcome of this action.

Proposed Amici Curiae submit this proposed brief in support of Respondent to explain why the statutory term "conviction" in the Immigration and Nationality Act, Section 101(a)(48)(A), should exclude convictions that have been vacated under state law. Pursuant to Rule 2.10, amici have attached a copy of the Proposed Brief of Amici Curiae for the Board's consideration.

Dated: October 12, 2021

Respectfully submitted,

Tiffany Lieu
Amanda Madigan, *Supervised Law Student*
Rachel Cohen, *Supervised Law Student*
Harvard Immigration and Refugee Clinical Program
6 Everett Street, WCC 3106
Cambridge, MA 02138
Phone: 617-384-7504
Fax: 617-495-8595
Email: tlieu@law.harvard.edu
Counsel for Amici Curiae

Andrew Wachtenheim
Nabilah Siddiquee
Immigrant Defense Project
P.O Box 1765
New York, NY 10027
Phone: 212- 725-6421
Counsel for Amici Curiae

PROOF OF SERVICE

On October 12, 2021, I, Tiffany Lieu, mailed or delivered a copy of the foregoing **PROPOSED BRIEF OF *AMICUS CURIAE* THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF RESPONDENT** and any attached pages via FedEx to the following address:

DHS/ICE Office of Chief Counsel – ELZ
625 Evans Street, Room 135
Elizabeth, NJ 07201

In addition, on October 12, 2021, I, Tiffany Lieu, mailed or delivered a copy of the foregoing **PROPOSED BRIEF OF *AMICUS CURIAE* THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF RESPONDENT** and any attached pages via electronic mail to counsel for Respondent, Matthew A. Johnson, at matthewajohnson@email.arizona.edu.

October 12, 2021
Date

Tiffany Lieu
EOIR #AA002889
6 Everett St. WCC 3109
Cambridge, MA 02138
(617) 496-5497
tlieu@law.harvard.edu

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PROPOSED BRIEF OF AMICI CURIAE THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF RESPONDENT

Tiffany Lieu
Amanda Madigan, *Supervised Law Student*
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Crimmigration Clinic
Harvard Immigration and Refugee
Clinical Program
6 Everett Street, WCC 3106
Cambridge, MA 02138
Phone: 617-496-5497
Fax: 617-495-8595

Andrew Wachtenheim
Nabilah Siddiquee
Immigrant Defense Project
P.O. Box 1765
New York, NY 10027
Phone: 212-725-6421

Counsel for Amici Curiae

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[redacted]

I. INTRODUCTION

Amici Curiae agree with Respondent [redacted] arguments that a prior conviction vacated under New Jersey's human trafficking vacatur statute satisfies the standard for determining whether a vacated conviction constitutes a "conviction" under the Immigration and Nationality Act ("INA") Section 101(a)(48)(A), as set forth by the Board of Immigration Appeals ("Board" or "BIA") in *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzale*s, 465 F.3d 263 (6th Cir. 2006). In *Matter of Pickering*, the Board held that state convictions remain convictions for immigration purposes even after they are vacated by the state if the reasons for vacating do not relate to a "procedural or substantive defect" in the underlying criminal proceedings. 23 I&N Dec. at 621, 624. The Board so held even though neither the statute nor legislative history mention, much less contemplate, vacated convictions. Accordingly, Amici write separately to present argument that this inclusion of vacated convictions set forth in *Matter of Pickering* is incorrect as a matter of constitutional and statutory law.

To begin, the Board's inclusion of certain vacated convictions in the conviction definition contravenes decades of jurisprudence, developed by the Board and courts, that centered on whether the state disposition was sufficiently final in the state proceedings to trigger immigration consequences. Contrary to the Board's interpretation, Congress's codification of the conviction definition through the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA") in 1996 did not change this deference to state finality. Division C of Pub. L. No. 104-208, 110 Stat. 3009-546. Indeed, Congress intended to adopt this prior jurisprudence, limiting its disagreement to only the narrow circumstance of deferred adjudications.

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[1] The Respondent is also known as [redacted]

Second, *Matter of Pickering*'s inclusion of vacated convictions for federal immigration purposes encroaches on realms traditionally reserved for the states: defining and enforcing criminal law and regulating employment law. In so doing, the Board violated the federalism canon of interpretation, which requires that Congress clearly state its intent to frustrate the constitutional balance between federal and state powers. Third, *Matter of Pickering* departs from decades-long jurisprudence centered on deferring to states regarding the finality of their own criminal dispositions. As such, *Matter of Pickering* similarly contravenes the prior-construction canon. Finally, to the extent any statutory ambiguity remains after applying the federalism and prior-construction canons of interpretation, the rule of lenity requires that any ambiguity be read in the noncitizen's favor: vacated convictions do fall within the INA's statutory definition of conviction.

Properly examined under these constitutional and interpretive canons, Congress intended the Board and courts to defer to the convicting jurisdiction as to whether a disposition exists as a conviction for purposes of federal immigration law. Prior dispositions vacated by the states—regardless of the state's reason for doing so—are not convictions under the INA. Thus, *Matter of Pickering*'s expansion of the conviction definition to include certain vacated convictions is incorrect, atextual, and must be reversed.

Amici respectfully move this Board and the Attorney General to vacate this erroneous and harmful precedent.

II. ARGUMENT

A. *Matter of Pickering*'s Interpretation of Conviction to Include Vacaturs Erroneously Departed from Decades of Settled Practice of Deferring to State Criminal Law Dispositions.

For decades prior to 1998, the Board and courts looked to states to determine whether a state disposition was sufficiently final in the state proceedings to trigger immigration

consequences. *See* Philip L. Torrey, *Principles of Federalism and Convictions for Immigration Purposes*, 36 Immigr. & Nat'y L. Rev. 3, 9–17 (2016). Congress left the term conviction undefined in the INA until 1996, so courts and the Board developed a conviction framework that centered on finality and deference to states' traditional realm of defining and enforcing their own criminal laws. *See id.* at 11. Despite this long history, the Board in *Matter of Pickering* erroneously expanded the definition of conviction and eliminated deference to states' criminal laws. *See Pickering*, 23 I&N Dec. at 624. The Board grounded its decision in an incomplete interpretation of IIRAIRA, which elided the statutory text itself and instead was based entirely on an incomplete analysis of legislative history. *See, e.g.*, *Matter of Punu*, 22 I&N Dec. 224, 227 (BIA 1998).

The result is a novel one: convictions that are vacated by states pursuant to their traditional sovereignty over criminal law may nonetheless constitute convictions that trigger immigration consequences. *See Matter of Pickering*, 23 I&N Dec. at 625. This Section lays the contextual foundation for *Matter of Pickering*'s erroneous interpretation of the conviction definition by first explaining the decades-long jurisprudence prior to 1998 of deferring to state dispositions, which the Board subsequently erroneously contravened after 1998 based on its interpretation of the conviction definition.

1. Prior to 1998, the Board and courts deferred to state determinations of whether a conviction existed.

For most of the twentieth century, deference to the states was the keystone to interpreting conviction for federal immigration purposes. *See* Torrey, *supra*, at 10. Under this decades-long jurisprudence developed at common law, the Board and courts looked to a state's criminal procedure laws to determine whether the state deemed the criminal disposition sufficiently final and a conviction for state law purposes. *Id*. at 12. Only when a conviction was final in the state's eyes would immigration consequences attach. *Id*. at 10–11.

In *Matter of F-*, 1 I&N Dec. 343, 348 (BIA 1942), for example, the Board held that a California criminal disposition—which allowed defendants to withdraw their guilty pleas and thereby erase their criminal charge after completing a term of probation—did not constitute a conviction for immigration purposes. The Board reasoned that the state criminal disposition could not "logically" constitute a conviction for purposes of immigration proceedings where the state could later set the guilty verdict aside. *Id.* at 348.

Subsequent Board and court decisions similarly emphasized deference to state criminal laws and the finality of state criminal dispositions. In *Pino v. Landon*, 349 U.S. 901, 901 (1955) (per curiam), the Supreme Court held that a Massachusetts guilty file disposition had not "attained such finality as to support an order of deportation" under the INA. In *Matter of R-R-*, 7 I&N Dec. 478, 479 (BIA 1957), the Board stated that "[w]hether a conviction is 'final' is a matter to be determined under the law of the place where the conviction occurred."

In 1988, the Board sought to make the finality requirement compatible with differing laws across the states. *Matter of Ozkok*, 19 I&N Dec. 546, 550 (BIA 1988). *Matter of Ozkok* enumerated three requirements for determining when a state disposition qualified as a conviction for immigration purposes: (i) a guilty finding; (ii) a court-ordered punishment; and (iii) sufficient finality such that no further proceedings were necessary to determine the individual's guilt or innocence.[2] *Id.* at 551–52. While *Matter of Ozkok* broadened the conviction definition, the Board

[2] The *Matter of Ozkok* three-part test required:

> (1) a judge or jury has found the [noncitizen] guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
> (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed . . .
> (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order,

nonetheless affirmed deference to the states. *Id.* at 551 (stating that, to test finality where adjudication of guilt is withheld, "further examination of the specific procedure used and the state authority under which the court acted will be necessary").

Eight years later, in 1996, Congress codified the definition of a conviction for the first time in the INA through passage of IIRAIRA. *See* INA § 101(a)(48)(A). In so doing, Congress adopted verbatim the first two prongs of *Matter of Ozkok*'s three-part test:

> The term "conviction" means, with respect to an alien, 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.

Id. Nowhere in the statutory text or legislative history does Congress mention, much less contemplate, vacated convictions. *See id.*; H.R. Conf. Rep. No.104-828, at 223–24 (1996) (hereinafter, "Conf. Rep.").

Thus, for decades the Board and courts gave preclusive effect to state decisions when determining whether a state disposition existed as a conviction for immigration purposes.

2. Post-1998, the Board departed from longstanding practice to erroneously expand the definition of conviction.

In the wake of IIRAIRA, the Board departed from decades-long jurisprudence affording deference to states' categorization of their criminal dispositions. *See, e.g., Punu,* 22 I&N Dec. at 227; *Matter of Roldan-Santoyo*, 22 I&N Dec. 512, 518 (BIA 1999). Conducting an analysis of

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> without availability of further proceedings regarding the person's guilt or innocence of the original charge.

Matter of Ozkok, 19 I&N Dec. at 551–52.

IIRAIRA's legislative history, the Board determined that Congress intended to broaden the conviction definition beyond what was laid out in *Matter of Ozkok*. *See Roldan-Santoyo*, 22 I&N Dec. at 518. The Board found that Congress spoke clearly to the issue in its conference report, having stated that *Matter of Ozkok* "[did] not go far enough." *Punu*, 22 I&N Dec. at 227 (quoting Conf. Rep. at 224).

In so concluding, however, the Board failed entirely to consider the text of the statute or acknowledge that the statute is silent as to expungement and vacaturs. Had the Board done so, it would have recognized that Congress intended to retain the common-law definition that led to *Matter of Ozkok* itself. *See infra* Section II.B&C. The Board instead relied upon legislative history to determine Congress's intent. *See Roldan-Santoyo*, 22 I&N Dec. at 518. There too, the Board failed to recognize that the legislative history is silent as to vacated and expunged convictions and that Congress focused narrowly on cases involving deferred adjudications. *See* Conf. Rep. at 224.

Indeed, Congressional Committee Conference Reports demonstrate that while *Matter of Ozkok*'s third prong, which the 1996 conviction definition omitted, dealt with the concept of finality, Congress did not in fact focus on finality. *See* Conf. Rep. Instead, Congress's focus in codifying the conviction definition was limited to deferred adjudications. *Id.* at 224. The Report stated that *Matter of Ozkok* "does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the [noncitizen's] good behavior." *Id.* The Report goes on to state that "[t]his new provision, by removing the third prong of *Ozkok*, clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws." *Id.* Thus, Congress did not express an intent to expand the definition of conviction except in this narrow class of dispositions. It certainly did not express an intent to

expand *Matter of Ozkok* to vacated convictions. *See Orabi v. Att'y Gen. of the U.S.*, 738 F.3d 535, 541 (3d Cir. 2014) ("[T]he statute explicitly eliminated the finality requirement for *deferred adjudications*. . . . [T]he Congressional Conference Committee Report accompanying IIRAIRA refers only to the modification of the treatment of deferred adjudications. . . ." (emphasis in original)).

Notwithstanding this absence of a clear statement in the statute and legislative history, the Board came down with *Matter of Pickering*, expanding the definition of conviction far beyond what Congress intended. *See* 23 I&N Dec. at 624. In *Matter of Pickering*, the Board held that state convictions remain convictions for immigration purposes after vacatur if the reasons for vacating the judgment do not relate to what the Board labels as "procedural or substantive defect[s]" in the underlying criminal proceedings. *Id.* at 621. The Board thereby swept vacated convictions into the definition of conviction without congressional authorization. *See supra* Section II.A.1. In so doing, the Board in *Matter of Pickering* contravened courts' long history of deference to states and Congress's intent to carefully circumscribe its definition of conviction.

Although the Third Circuit has afforded the Board *Chevron* deference as to the reasonableness of distinguishing between substantive or procedural vacaturs and rehabilitative vacaturs, it has never considered a head-on challenge to *Matter of Pickering*, and its deference is not absolute. *See Pinho v. Gonzalez*, 432 F.3d 193, 204 (3d Cir. 2005). In *Pinho*, a noncitizen unsuccessfully applied for lawful permanent residence status after his drug-related criminal conviction was vacated. *Id.* at 197. While the Third Circuit found that the distinction between types of vacaturs was not necessarily unreasonable, the court noted that the Board had "not explained precisely its reasoning." *Id.* at 209. Instead, as the court noted, the Board analogized deferred adjudications to vacaturs, "corrall[ing] within §1101(a)(48)(A) all post-conviction expungement

procedures that are analogous to withholding judgment." *Id.* at 207. The Third Circuit proceeded to set out a "categorical test" for classifying vacated convictions as substantive or procedural, or rehabilitative that, notably, emphasizes deference to state court orders. *Id.* at 215. Under this test, the Board must look first to the state order itself and, if the order explains the basis for the vacatur, the Board's inquiry must end. *Id.* Highlighting federalism concerns, the Third Circuit emphasized that the Board should not "look behind" a state vacatur to determine the court's motives in vacating a conviction. *Id.* at 213–14.

Almost a decade after noting this "corralling," the Third Circuit interpreted IIRAIRA to find that the statute "broaden[ed] the scope of [the conviction definition]," but only in terms of deferred adjudications. *Orabi*, 738 F.3d at 540. Before the court in *Orabi* was whether a conviction meets the finality requirement where there is a pending direct appeal of the conviction in state court. The court found that it did not, emphasizing the importance of the finality requirement. *Id.* at 543. Indeed, focusing on IIRAIRA's legislative history, the Court emphasized that IIRAIRA did not "refer to, amend, change, or even mention doing away with the need for appeal to acquire finality of judgment," and that, instead, Congress focused exclusively on deferred adjudications. *Id.* at 540–41. The court thus held that the Third Circuit's finality requirement "remained undisturbed." *Id.* at 540.

Thus, though the Board erroneously expanded the definition of conviction beyond Congress's intent and in contravention of decades-long jurisprudence, the Third Circuit still recognizes the importance of finality and deference to state criminal dispositions.

B. *Matter of Pickering* Violates Constitutional Principles of Federalism and Should Be Overturned.

The Constitution reserves any powers not specifically enumerated to the federal government for the states. *See* U.S. Const. amend. X, § 8. Such state police powers are "deeply

ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000) (alteration and internal quotation marks omitted). Thus, "courts 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." *Ass'n N.J. Rifle & Pistol Clubs v. Governor of N.J.*, 707 F.3d 238, 240 (3d Cir. 2013) (internal quotation marks and citation omitted). To protect this fundamental balance between federal and state powers, courts turn to the federalism canon of statutory interpretation. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1989). The canon requires that a federal statute speak "unmistakably clear[ly]" to Congress's intent to alter the traditional federal/state balance of power before it will be interpreted to accomplish that result. *Id.* (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)).

Matter of Pickering's inclusion of vacaturs in the conviction definition dramatically infringes on two such state police powers: states' inherent sovereignty over criminal law and employment regulation. Because Congress did not clearly state its intention to violate the balance of federal and state power, *Matter of Pickering* violates federalism norms and should, accordingly, be overturned.

1. Vacatur of state convictions falls squarely within the state's constitutional "police powers" over criminal laws and employment.

Matter of Pickering's holding that state convictions that have been subsequently vacated may nonetheless trigger immigration consequences impermissibly encroaches on states' fundamental powers over their criminal laws and employment interests.

First, states are sovereign with respect to the enforcement of their own criminal laws. *Heath v. Alabama*, 474 U.S. 82, 89 (1985). As the Supreme Court has repeatedly recognized, the power "to determine what shall be an offense against its authority and to punish such offenses" is a quintessential state police power. *Id.* Because the authority to define offenses and convictions

under state law are essential state functions that do not fall within any enumerated Congressional power, these "legislative power[s are] reserved for the States, as the Tenth Amendment confirms." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018); *see also United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law." (internal quotation marks omitted)). *See, e.g.*, *Philadelphia v. Att'y Gen. of U.S.*, 916 F.3d 276, 281 (3d Cir. 2019) (stating that states possess "primary authority for defining and enforcing the criminal law" (quoting *Lopez*, 514 U.S. at 561 n.3)); *see also United States v. Rutherford*, 236 Fed. App'x 835, 844 (3d Cir. June 26, 2007) (stating that the federal government should "leave enforcement of general criminal laws to the states"); *Thomas v. Williamson*, 152 Fed. App'x 199, 201 (3d Cir. Oct. 25, 2005) ("The [Supreme] Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty' . . . ." (quoting *Heath*, 474 U.S. at 89)). Indeed, "[p]erhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014). Accordingly, the delineation of the circumstances under which a conviction obtains under a state criminal statute, and the regulation of punishment for such convictions, is squarely within the states' police powers. Thus, by attaching consequences to convictions that states have vacated, *Matter of Pickering* overrides states' police power to regulate the impact of criminal convictions within their borders.

Second, *Matter of Pickering* similarly frustrates states' "broad authority under their police powers to regulate the employment relationship to protect workers within the State." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976), *superseded by statute*, Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in Chamber of Com. of U.S. v. Whiting*, 563 U.S.

582, 588 (2011); *see Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 134 (3d Cir. 2018) (affirming that "the employment law context . . . 'falls squarely within the traditional police powers of the states, and as such should not be disturbed lightly'" (quoting *Gary v. Air Grp., Inc.*, 397 F.3d 183, 190 (3d Cir. 2005))); *Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 818 (3d Cir. 2019) (explaining that employment regulations to protect workers are within a state's police power). Pursuant to this traditional state realm, states establish rehabilitative initiatives like expungement laws, post-sentencing modifications, and vacaturs to regulate employment by removing barriers to employment like convictions. *See, e.g.*, Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. Cal. Interdisc. L.J. 395, 397–98 (2016) (explaining how criminal history is a barrier to employment). Removing these barriers allows more people to obtain employment, which in turn reduces re-conviction rates. *See, e.g.*, Steven J. Tripodi, Johnny S. Kim & Kimberly Bender, *Is Employment Associated With Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, 54 Int'l J. Offender Therapy and Compar. Crim. 706, 706 (2010) ("[A]mong parolees who are reincarcerated, those who obtain employment spend more time . . . in the community before returning to prison."). These laws should be considered within the states' rights that cannot be infringed upon by the federal government, as memorialized in the Tenth Amendment.

Notwithstanding states' authority to define convictions under their laws and regulate employment, the Board effectively overrode states' authority to vacate and otherwise modify convictions in *Matter of Pickering*. *See* 23 I&N Dec. at 624. By interpreting state criminal dispositions as convictions, this holding improperly treads on states' abilities to achieve the goals of their rehabilitative measures. Due respect for "background principles of our federal system" requires that courts ensure that Congress affirmatively intended "to regulate areas traditionally

supervised by the States' police power" before interpreting a federal statute to accomplish that result. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006). In the absence of such evidence on the face of § 101(a)(48)(A), as discussed next, the Board should give full effect to states' vacatur laws in federal immigration proceedings.

2. *Matter of Pickering* violates fundamental federalism norms where INA § 101(a)(48)(A) lacks an "unmistakably clear" statement of intent to include vacated convictions and therefore encroaches on state police powers.

While Congress is not absolutely foreclosed from regulating in an area of traditional state concern, its ability to do so "is an extraordinary power in a federalist system," one that courts "must assume Congress does not exercise lightly." *Gregory*, 501 U.S. at 460. Because Congress did not expressly state its intention to shift the balance of federalism in the INA as to states' power to define convictions, § 101(a)(48)(A) should be interpreted, as it had been for decades, with deference to the states' traditional police power.

In *Gregory*, the Supreme Court upheld a Missouri law setting mandatory retirement ages for state judges despite a challenge under the federal Age Discrimination in Employment Act. 501 U.S. at 452. The Court found that state judges were not covered employees under the federal law because there was no plain statement that Congress had intended the federal law to apply to the state judiciary, an area "of the most fundamental sort for a sovereign entity." *Id.* at 460.

So too here. The INA's definition of conviction under § 101(a)(48)(A) does not clearly include expunged, vacated, or otherwise modified sentences, and regulating this area is fundamental to state sovereignty. *See Gregory*, 501 U.S. at 467; *Sikkelee v. Precision Auto. Corp.*, 822 F.3d 680, 683 (3d Cir. 2016) ("Congress must express its clear and manifest intent to preempt an entire field of state law."); *see also Pinho*, 432 F.3d at 209 n.22. Pursuant to federalism principles, it is the states—not the federal government—that have authority over administering

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their own criminal laws and defining when a permanent violation of those laws has occurred. States' police power over their own criminal laws may not be disturbed absent an "unmistakably clear" statement of intent from Congress. *Gregory*, 501 U.S. at 467.

Here, there is no "unmistakably clear" statement of intent to encroach on state police powers. In situations outside of deferred adjudications of guilt, the INA defines "conviction" as "a formal judgment of guilt of the [noncitizen] entered by a court." INA § 101(a)(48)(A). A vacated conviction is not a formal judgement of guilt—indeed, it is a formal decision to throw out a judgement of guilt because it is no longer valid. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950) (explaining that motions to vacate are "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."). Based on the statutory text, there is little indication that Congress considered—let alone intended—inclusion of vacated convictions. *See Pinho*, 432 F.3d at 207 ("The statute, of course, says nothing about vacated convictions.").[3] The legislative history similarly signals no intent to include vacated convictions in the INA conviction definition. *See supra* Section II.A.2.

[3] While the Third Circuit in *Pinho* deferred to the Board's interpretation under *Chevron*, its deference was misplaced as it did not properly consider constitutional concerns or the import of the federalism canon. *See Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (stating that *Chevron* deference is particularly unwarranted "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power"). Moreover, the *Pinho* court opined on a different question—i.e., the reasonableness of the Board's distinction between substantive vacaturs and rehabilitative vacaturs—without directly addressing the issue at bar—namely, the validity of *Matter of Pickering*'s inclusion of vacaturs in the conviction definition absent clear congressional intent. This direct interpretation question has never been decided by the Third Circuit. Finally, it is not clear that *Chevron* deference applies in this context in the first instance, as interpretation of statutes that, like INA § 101(a)(48)(A), implicate criminal law is reserved exclusively for the judiciary, not the executive branch. *See, e.g.*, *Nunez-Reyes v. Holder*, 646 F.3d 684, 712 (9th Cir. 2011) (en banc) (Pregerson, J., dissenting) ("Because construction of [the term "conviction"] has consequences for the administration of criminal law, it is the independent duty of the judiciary, and not the BIA, to assign to the term a meaning." (internal citation omitted)).

The absence of a clear statement in § 101(a)(48)(A) concerning vacated convictions is all the more telling given the presence of a clear statement elsewhere in the U.S. Code. For example, the Medicare and Medicaid Patient and Program Protection Act of 1987, which excludes individuals and entities with certain convictions from health care programs, defines "conviction" as "a judgment of conviction . . . entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending *or whether the judgment of conviction or other record relating to criminal conduct has been expunged*." 42 U.S.C. § 1320a-7(i)(1) (emphasis added). That Congress said nothing about vacaturs in the text of § 101(a)(48)(A) suggests that, at best, it did not consider the issue or its federalism implications. *Cf. United States v. Bass*, 404 U.S. 336, 349 (1971) ("[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."). The federalism canon requires that courts interpret this statutory ambiguity to exclude vacated convictions, to avoid intruding on the fundamental state function of defining crimes and punishment in order to regulate public safety. *See Philadelphia*, 916 F.3d at 281 (designating states as having "primary authority for defining and enforcing the criminal law") (internal quotation marks and citation omitted); *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 334 (3d Cir. 2009) ("Health and safety issues have traditionally fallen within the province of state regulation."). Because of the inconsistency between the effects of state and federal conviction definitions, federal immigration law as currently interpreted impermissibly upsets foundational principles of federalism when it attaches removal consequences to state criminal dispositions intended to further state goals.

Congress's plenary power over immigration does not lessen the states' authority over criminal law within their sovereign borders. The Supreme Court has applied the federalism canon

in areas such as bankruptcy, a congressional power specifically enumerated in the Constitution. *See* U.S. Const. art. I, § 8, cl. 4. In *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 533 (1994), the Court applied the canon in determining whether a foreclosure sale carried out in compliance with state law could nonetheless constitute a fraudulent transfer under the federal bankruptcy code. While the Court acknowledged that Congress "has the power pursuant to its constitutional grant of authority over bankruptcy to disrupt [state] . . . foreclosure law," it emphasized states' "essential sovereign interest in the security and stability of title to land." *Id.* at 543, 545 n.8 (internal citation omitted). In light of that paramount state interest, the Court found that the bankruptcy code's requirement that transfers of property by insolvent debtors be in exchange for "reasonably equivalent value" evinced an insufficiently clear intent to set aside foreclosure sales that were otherwise valid under state law. *Id.* at 544–45. The weight of the federalism canon is not diminished simply because the federal statute at issue regulates a matter over which Congress has constitutional authority.

The application of the federalism canon to the INA requires preservation of state sovereignty. The conviction definition ought to be interpreted to exclude all vacated, expunged, or otherwise relevantly altered state convictions, like those at issue in this case.

C. Proper Application of Other Traditional Canons of Statutory Construction Demonstrates that the Statutory Definition of Conviction Does Not Include Vacated Convictions.

Application of other canons of statutory construction yields the same result. Where, as here, the statutory text is silent, the Board should look to the prior-construction canon, which highlights Congress's intent to give effect to decades-long settled practice of requiring finality and deferring to state court dispositions. To the extent the Board is not persuaded by the federalism or prior-construction canon, the Board should resolve the statutory ambiguity in the noncitizen's favor

pursuant to the rule of lenity. Under any of these interpretive tools and their underlying principles, *Matter of Pickering*'s inclusion of vacated convictions in the INA's definition of conviction is erroneous.

1. *Matter of Pickering* erroneously departed *sub silentio* from the longstanding settled meaning of the conviction definition, in contravention of the prior-construction canon.

The prior-construction canon starts from the principle that Congress does not legislate on a blank slate. Accordingly, under this canon, "[w]hen the words of the Court are used in a later statute governing the same subject matter," courts should "give the words the same meaning in the absence of specific direction to the contrary." *Williams v. Taylor*, 529 U.S. 420, 434 (2000). Applied here, the prior-construction canon mandates that courts adhere to the decades-long practice of deferring to states to give meaning to convictions.

In *Williams v. Taylor*, the Supreme Court sought to interpret the meaning of "failed to develop" under 28 U.S.C. § 2254(e)(2) of the Antiterrorism and Effective Death Penalty Act ("AEDPA") to determine whether AEDPA bars an evidentiary hearing where the petitioner did not develop the factual basis of her claims in state court proceedings despite diligent efforts. *Williams*, 529 U.S. at 430. In holding that it does not, the Court emphasized that the language of § 2254(e)(2) "echoes" that in a prior case, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992). In *Keeney*, the Court noted a prisoner's "failure to develop material facts in state court" and held that the prisoner was required to meet a heightened standard of prejudice before receiving a hearing on his claim. *Id.* Applying the prior-construction canon, the *Williams* Court concluded that, because § 2254(e)(2) mirrored the language of *Keeney*, "Congress intended to preserve at least" that aspect of *Keeney*'s holding. *Williams*, 529 U.S. at 433. The Court interpreted "failed to develop" accordingly.

So too here. In setting forth the definition of a conviction in the INA in 1996, Congress adopted verbatim the first two prongs of *Matter of Ozkok*'s three-part test. *Compare* INA §101(48)(A), *with Ozkok*, 19 I&N Dec. at 551–52; *see supra* Section II.A.1. In so doing, Congress demonstrated its intent to preserve at least one aspect of the decades-long meaning of conviction under *Matter of Ozkok* in the pre-1996 era: deference to states' own categorization of their criminal dispositions, including for vacated convictions. *See Williams*, 529 U.S. at 433 (concluding that, based on the similarity between the Court's phrasing in past precedent and the statutory clause at issue, "Congress intended to preserve at least one aspect of" the precedent's holding); *see also Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530–31 (holding that, where statutory text is "taken virtually verbatim" from judicial precedent, Congress intended to codify such precedent).

Indeed, Congress's decision to omit only *Matter of Ozkok*'s third prong, which addressed deferred adjudications, and the legislative history surrounding this decision, demonstrate that Congress diverged from decades-long jurisprudence only in the narrow circumstance of deferred adjudications. As the Conference Report reveals, Congress believed that *Matter of Ozkok* "does not go far enough to address *situations where a judgment of guilt or imposition of sentence is suspended*, conditioned upon the [noncitizen's] future good behavior." Conf. Rep. at 223–24 (emphasis added). Thus, "[t]his new provision, by removing the third prong of *Ozkok*, clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a conviction for purposes of the immigration laws." *Id.*; *see also Orabi*, 738 F.3d at 540–41 (stating that Congress referred only to modifying the treatment of deferred adjudications and applying the prior-construction canon to read IIRAIIRA's conviction definition as enacting changes only with respect to deferred adjudications).

"[T]here is no basis in the text of [§ 101(a)(48)(A)] to believe that Congress" understood conviction to include vacaturs. *Williams*, 529 U.S. at 433. Instead, the prior-construction canon dictates that the prior regime of deference to state dispositions, including for vacated convictions, remains in effect.

2. In the alternative, the Board should resolve any remaining ambiguity in the conviction definition in favor of the noncitizen pursuant to the rule of lenity.

Finally, to the extent there is any lingering ambiguity after application of the federalism and prior-construction canons, the rule of lenity forecloses *Matter of Pickering*'s interpretation of the conviction definition to include vacaturs. The rule of lenity provides that where Congress has not "plainly and unmistakably" spoken to the issue at hand, any statutory ambiguity must be resolved in favor of the defendant. *Bass*, 404 at 348–49 (citation omitted). The rule of lenity is based on the principles that defendants are entitled to "fair warning" regarding what the law will do, and that, where criminal consequences are particularly severe, the legislature must have spoken clearly to the issue. *Id.* The rule applies here because the INA attaches criminal penalties to prior criminal convictions, *see, e.g.*, INA §§ 276(b), 274C(e)(2), 277,[4] and the definition of conviction applies to the entire act, *see* INA § 101(a). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (holding that, within the immigration context, the rule of lenity operates as "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]").[5]

[4] INA § 276(b) establishes criminal penalties for reentry into the United States following conviction; INA § 274C(e)(2) establishes criminal penalties for failure to disclose role as document preparer; and INA § 277 establishes criminal penalties for aiding or assisting people with prior convictions to enter the United States.

[5] Furthermore, application of the rule of lenity is consistent with the scope of the Board's delegated power under the INA, which does not extend to the INA's criminal law provisions. The

To the extent the Board finds that the federalism canon does not invalidate *Matter of Pickering*'s inclusion of vacated convictions in the conviction definition, the language and legislative history of IIRAIRA are sufficiently ambiguous to invoke the rule of lenity. INA § 101(a)(48)(A) nowhere mentions vacaturs, nor has Congress demonstrated any intent to expand the definition of conviction to vacaturs. While the INA defines convictions as, inter alia, "a formal judgment of guilt," INA § 101(a)(48)(A), it is silent as to instances where such judgments are subsequently vacated. The Conference Report and broader legislative history similarly do not mention, much less contemplate, whether vacated state convictions trigger immigration consequences. *See supra* Section II.A.2. Where the statute is, at best, ambiguous, and where Congress knew the pre-1996 test for convictions, including vacated convictions, yet did not squarely address vacaturs in the statute, the rule of lenity should attach in the noncitizen's favor.

This is particularly true as the consequences of deportation are severe. *See Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) ("[P]reserving [a noncitizen's] right to remain in the United States may be more important to the [noncitizen] than any potential jail sentence." (internal citation and quotation marks omitted)); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (explaining that deportation is a "drastic measure," often the equivalent of "lifelong banishment or exile" (internal citation and quotation marks omitted)); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("We resolve the doubts in favor of that construction because deportation is a drastic

INA's delegation provision states that the "Attorney General shall be charged with the administration and enforcement of . . . laws relating to the immigration and naturalization of [noncitizens]." INA § 103(a). The provision does not delegate to the Board the authority to define federal criminal law. While the Supreme Court has found that Congress has delegated authority to the Attorney General to define or apply a criminal statute, the text of the delegation in those cases was clear. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2125 (2019). There was no such clear delegation of authority here. The INA's delegation provision is silent as to the criminal provisions within the statute itself.

measure . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. . . ."). In order to impose such a severe penalty as deportation based on a broad definition of conviction, there must be certainty that Congress intended to impose such consequences. *See Fong Haw Tan*, 333 U.S. at 10 ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on [the noncitizen's] freedom beyond that which is required by the *narrowest* of several possible meanings of the words used."); *Leocal v. Ashcroft*, 543 U.S. 1, 12 n. 8 (2004) (applying the rule of lenity in favor the noncitizen given statutory ambiguity). No such indication, much less certainty, exists here.

Accordingly, the rule of lenity attaches and any statutory ambiguity as to vacated convictions should be read in the noncitizen's favor to, consistent with decades-long jurisprudence, not constitute a conviction for immigration purposes.

III. CONCLUSION

Under a proper interpretation of the INA, prior dispositions eliminated by the states are not convictions for immigration purposes. The BIA should accordingly overturn *Matter of Pickering* and remand this case for proceedings consistent with their decision.

Respectfully Submitted,

October 12, 2021
Date

Tiffany Lieu
Amanda Madigan, *Supervised Law Student*
Rachel Cohen, *Supervised Law Student*
Harvard Immigration and Refugee Clinical Program
6 Everett Street, WCC 3106
Cambridge, MA 02138
Phone: 617-384-7504
Fax: 617-495-8595
Email: tlieu@law.harvard.edu
Counsel for Amici Curiae

Andrew Wachtenheim
Nabilah Siddiquee
Immigrant Defense Project
P.O Box 1765
New York, NY 10027
Phone: 212- 725-6421
Counsel for Amici Curiae

PROOF OF SERVICE

On October 12, 2021, I, Tiffany Lieu, mailed or delivered a copy of the foregoing **PROPOSED BRIEF OF *AMICUS CURIAE* THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF RESPONDENT** and any attached pages via FedEx to the following address:

DHS/ICE Office of Chief Counsel – ELZ
625 Evans Street, Room 135
Elizabeth, NJ 07201

In addition, on October 12, 2021, I, Tiffany Lieu, mailed or delivered a copy of the foregoing **PROPOSED BRIEF OF *AMICUS CURIAE* THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF RESPONDENT** and any attached pages via electronic mail to counsel for Respondent, Matthew A. Johnson, at matthewajohnson@email.arizona.edu.

October 12, 2021
Date

Tiffany Lieu
EOIR #AA002889
6 Everett St. WCC 3109
Cambridge, MA 02138
(617) 496-5497
tlieu@law.harvard.edu