BEYOND *ROLDAN* AND *PICKERING*

LITIGATION RESOURCE & SAMPLE BRIEFING

Arguing that All Post-Conviction Relief Must Be Recognized by Immigration Law

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Since 1999, the federal immigration agency has ceased to recognize several forms of post-conviction relief that vacate, expunge, or otherwise eliminate a prior state conviction. This has been based primarily on two wrongly-decided precedential decisions of the Board of Immigration Appeals (BIA): *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (en banc), and *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). These decisions are now applied against noncitizens so routinely that litigants have largely stopped mounting legal challenges to their incorrectness. However, proper statutory interpretation of the definition of the term "conviction" in the Immigration and Nationality Act (INA), as well as significant legal developments since *Roldan* and *Pickering*, support overruling these decisions as contrary to statute and unreasonable.

In recent years, the Supreme Court increasingly has been highly critical of federal courts reflexively applying *Chevron* deference without carefully applying traditional tools of statutory construction. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) ("In according *Chevron* deference to the BIA's interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned, and whether the BIA's interpretation was reasonable . . . . This analysis suggests an abdication of the Judiciary's proper role in interpreting federal statutes." (citation omitted)); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) ("[T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation.").

This resource is intended to assist on-the-ground immigration practitioners in challenging, or preserving challenges to, these precedents before the agency and federal courts. Specifically, it outlines arguments to show that these decisions were wrong to include vacated and expunged convictions within the immigration definition of a "conviction." These arguments are presented in sample briefing format for easy placement in briefs to the federal immigration agency and to federal courts. They are intended to persuade agency adjudicators to revisit these damaging, incorrect precedents, and also to preserve arguments and issues for subsequent judicial review.

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INTRODUCTION

State criminal convictions can create numerous challenges for noncitizens who are in removal proceedings or applying for immigration relief. Yet even when a state eliminates a prior conviction and determines that it should have no further legal effect, that state vacatur, expungement, or other post-conviction relief might not be recognized for purposes of federal immigration law under current Board of Immigration Appeals (BIA) precedent. An individual may be surprised to learn that their vacated or expunged state disposition may still cause deportability, inadmissibility, ineligibility for relief, or other serious immigration consequences. However, these are immigration consequences that Congress did not intend and that violate the Immigration and Nationality Act (INA) because they wrongly interpret the definition of "conviction" to include eliminated prior convictions.

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, no federal statute defined the term "conviction" for purposes of immigration law. Immigration adjudicators generally relied on state law to determine whether a court disposition was a "conviction." This meant that a prior conviction that was later vacated or expunged by a state court was, with limited exceptions, not a "conviction" for purposes of immigration law.[1]

Since 1999, however, the BIA and Attorneys General (AG) have departed from that longstanding precedent through several precedential decisions, refusing to respect many state post-conviction actions and erroneously interpreting the INA's definition of "conviction" at INA § 101(a)(48)(A) to include vacated and expunged convictions. The first significant precedent on this issue was *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (en banc). In *Roldan*, the BIA sitting en banc held that the new statutory definition of the term "conviction" codified in IIRIRA includes prior convictions that have been expunged by, what the majority labeled, "rehabilitative relief." *Id.* at 523 (noncitizens "remain convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure"). Four BIA members dissented, finding that the codification of the "conviction" definition did not alter the decades of precedent that gave full effect, in almost all cases, to the elimination of a prior conviction. *Id.* at 529–34 (Board Members Villageliu, Schmidt, Rosenberg, and Guendelsberger, dissenting in part and concurring in part).

The second significant precedent was *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). In *Pickering*, the BIA addressed conviction vacaturs and held that vacated prior state convictions fall within the INA definition of "conviction" if deemed vacated solely "for reasons unrelated to the merits of the underlying criminal proceedings." *Id.* at 624 ("[W]e find that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such

[1] *See* Philip L. Torrey, *Principles of Federalism and Convictions for Immigration Purposes*, 36 Immigr. & Nat'y L. Rev. 3, 9–17 (2016); *Pinho v. Gonzales*, 432 F.3d 193, 208 (3d Cir. 2005) ("The BIA held as early as 1943 that an expunged conviction was not a 'conviction' for immigration purposes, and adhered to that position with only occasional exceptions until [1999].").

as rehabilitation or immigration hardships."). As a matter of administrative and constitutional law, these decisions are incorrect and unsanctioned misinterpretation of the INA definition of conviction and accompanying legislative history, which do not refer to vacated or expunged convictions as coming within the conviction definition.

While *Matter of Roldan* and *Matter of Pickering* are precedential decisions and have been deferred to by federal circuit courts of appeal, there are strong arguments that these decisions should be overturned as inconsistent with the INA and Constitution.[2] Further, case law developments regarding the standards for circuit court review of agency decisions of statutory interpretation should prompt courts to reconsider prior deference to the BIA on interpretation of the conviction definition. The plain text of the statute, as well as relevant legislative history and application of traditional tools of statutory interpretation based on constitutional principles, make clear that the INA definition of "conviction" does not include prior dispositions that have been vacated or expunged, no matter the state's reason for the post-conviction action. *Roldan* and *Pickering* must be overruled, and the BIA's precedents must be amended to reflect congressional intent to continue to defer to the States and their police powers in conviction matters in immigration proceedings.

CONTACT US

IDP encourages litigants to contact us for technical assistance and amicus support. We can be reached at: litigation@immdefense.org, andrew@immdefense.org, or nabilah@immdefense.org.

Additional resources can be found at: www.immigrantdefenseproject.org/litigation/conviction-definition/.

[2] *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (explaining that on issues of statutory construction, courts "must reject administrative constructions which are contrary to clear congressional intent.").

ARGUMENTS

CHALLENGING THE RULINGS IN *ROLDAN* AND *PICKERING* THAT A VACATED OR EXPUNGED CRIMINAL COURT DISPOSITION MAY REMAIN A "CONVICTION" UNDER INA § 101(A)(48)(A)

I. Relevant Statutory Background and BIA Precedents on the Definition of "Conviction"

A. Pre-IIRIRA BIA and AG Decisions Deferring to State Determinations Regarding Disposition of Criminal Charges

With no statutory definition of "conviction" for immigration purposes for most of the twentieth century, the BIA almost always deferred to a state's determination for whether a disposition constitutes a conviction. *See, e.g.*, *Matter of L-R-*, 8 I&N Dec. 269, 270 (BIA 1959); *Matter of G-*, 9 I&N Dec. 159, 164 (BIA 1960; AG 1961); *Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966; AG 1967); *see generally Pinho v. Gonzales*, 432 F.3d 193, 208 (3d Cir. 2005) ("The BIA held as early as 1943 that an expunged conviction was not a 'conviction' for immigration purposes, and adhered to that position with only occasional exceptions until *Roldan*."); *but see Matter of A-F-*, 8 I&N Dec. 429 (BIA 1959). Importantly, this meant that vacated or expunged convictions could not sustain charges of deportability. *See, e.g.*, *Matter of Sirhan*, 13 I&N Dec. 592, 600 (BIA 1970) (vacated convictions); *Matter of G-*, 9 I&N Dec. 159, 164 (BIA 1960, AG 1961) (expunged convictions).

In 1988, the BIA published *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), which was the last significant agency precedent addressing the definition of conviction prior to the adoption of a statutory definition in the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) in 1996. In *Ozkok*, the Board reaffirmed that a disposition is a conviction generally only where "the court has adjudicated [the noncitizen] guilty or has entered a formal judgment of guilt." *Id.* at 551. The only exception, first identified in *Ozkok*, was for certain withheld adjudications. The BIA held that, in cases where adjudication of guilt has been withheld, the disposition would amount to a conviction where:

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

Id. at 551–52.

B. IIRIRA and Subsequent BIA Precedent

Eight years after *Ozkok*, Congress codified the definition of "conviction" for the first time in IIRIRA. *See* INA § 101(a)(48)(A). In this definition, Congress adopted *Ozkok*'s two categories of convictions almost verbatim: (1) a "formal judgment of guilt," and (2) a deferred or withheld adjudication but applying only the first two requirements of *Ozkok*'s tripartite test:

> (A)
> (i)
> a judge or jury has found the [noncitizen] guilty or
> the [noncitizen] 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 [noncitizen]'s liberty to be imposed.

INA § 101(a)(48)(A); attached as Appendix A.

In codifying a definition in the INA, Congress did not alter the first prong of the *Ozkok* definition of conviction, a "formal judgment of guilt entered by a court." Congress only altered the second prong of the *Ozkok* definition, withheld adjudications. For withheld adjudications, Congress adopted the first two requirements of *Ozkok*'s tripartite test but omitted the third. Nowhere does the INA definition expressly include or even refer to vacated or expunged convictions, nor does the accompanying legislative history discuss them. *See* H.R. Conf. Rep. No.104-828, at 223–24 (1996).

The BIA nevertheless held in *Matter of Roldan* that convictions eliminated for so-called "rehabilitative" reasons remain convictions for immigration purposes in light of the codified "conviction" definition. 22 I&N Dec. 512, 521–23 (BIA 1999) (en banc). The majority held that the Congressional Committee Conference Report provided "a clear indication that Congress intends that the determination of whether [a noncitizen] is convicted for immigration purposes be fixed at the time of the original determination of guilt[.]" *Id*. at 521. However, as the concurring and dissenting opinion pointed out, the majority's conclusion rested on deeply flawed reasoning because the legislative history "does not expressly evince any will on the part of Congress to include all vacated or expunged criminal convictions within the definition of a conviction." *Id*. at 531–32 (Bd. Member Villageliu, et al., dissenting in part and concurring in part); *id* at 529–30 (characterizing as *dicta* the part of the majority opinion that found "the scope of section 101(a)(48)(A) of the Act is also designed to cover all convictions that have been either vacated or expunged."). *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379–80 (BIA 2000) (holding that a conviction vacated under Article 440 of New York's Criminal Procedure Law is not a conviction because such vacatur is not a state rehabilitative action, distinguishing *Roldan*).

Then, in *Matter of Pickering*, the Board held that a conviction that is vacated "based on a defect in the underlying criminal proceedings" is no longer a "conviction" under the statutory definition, while a conviction vacated "for reasons unrelated to the merits of the underlying criminal proceedings" remains a conviction for immigration purposes. 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other her grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). The Board and the Attorney General subsequently reiterated this distinction. *See Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006) (applying *Pickering*'s distinction between vacatur based on "post-conviction events, such as rehabilitation" and vacatur based on defect in underlying proceedings); *Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 708–13 (AG 2005).

II. The Plain Text of the INA Conviction Definition Unambiguously Does Not Include Vacated or Expunged Convictions.

The text of the conviction definition, § 101(a)(48)(A), defines two categories of convictions: (1) formal judgments of guilt and (2) certain withheld adjudications. INA § 101(a)(48)(A). The definition does not include any language referring to prior convictions that have been eliminated through post-conviction relief, such as vacatur or expungement, much less include any language expressly providing that convictions that no longer exist may continue to be deemed convictions for immigration purposes. *See supra* Section I. Rather, a formal judgment of guilt or other prior disposition that has since been vacated or expunged signifies the *absence* of any conviction (the prior disposition having been eliminated). This is the only reading consistent with how Black's Law Dictionary—the preeminent authority for the meaning of legal terminology—understood these terms of art at the time that Congress enacted the "conviction" definition. *Cf. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) (consulting "reliable dictionaries," such as Black's, to identify statutory meaning). In its edition in circulation in 1996, Black's identified the meaning of the term "judgment" as:

> The final decision of the court resolving the dispute and determining the rights and obligations of the parties. The law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceeding.

BLACK'S LAW DICTIONARY 841-42 (6th ed. 1990). It is unambiguous that a formal judgment that has been vacated is not the final decision of the court, nor is it the last word in a judicial controversy, nor is it the final determination of the court—by definition, a vacated judgment has been superseded by a subsequent judgment. Black's identified that "vacate" means, "To render an act void; as, to vacate an entry of record, or a judgment," *id.* at 1548, and that "expunge" means, "To destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information—including criminal records—in files, computers, or other depositories." *Id.* at 582.[3] Prior judgments rendered void are no longer judgments—they are void. Nor are judgments ordered to be destroyed or obliterated—they have been destroyed or obliterated.

[3] Black's defined "formal" to mean, "Relating to matters of form," *id.* at 652, and "guilt" to mean, "In criminal law, that quality which imparts criminality to a motive or act, and renders the person amenable to punishment by the law." *Id.* at 708.

The statute's meaning is plain: prior convictions eliminated through vacatur or expungement are not included within the INA's conviction definition. *Cf. Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."). Had Congress intended otherwise, it would have used different words in creating the statutory definition. Instead, Congress chose terms that are both commonly and historically understood to exclude dispositions of vacatur and expungement. *See supra* Section I. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. That is the case here. It is unambiguous that Congress intended to codify continued deference to state decisions to vacate and expunge prior convictions. This reading of the statute is further supported by its legislative history and applicable statutory construction principles. *See infra,* Sections III–IV. The Board must give effect to Congress' intent. Against this backdrop, the Board's inclusion of vacated and expunged judgments in *Roldan* and *Pickering* is an unauthorized expansion of the definition that is contrary to and inconsistent with unambiguous congressional intent.

III. Legislative History Confirms That the INA Conviction Definition Does Not Extend to Vacated or Expunged Convictions.

The legislative history of INA § 101(a)(48)(A) clarifies that Congress, in codifying the conviction definition, did not articulate any intent to include vacated and expunged convictions. The Congressional Committee Conference Report accompanying the enactment of § 101(a)(48)(A) shows that Congress was adopting the *Ozkok* definition but wished to alter it *only* with respect to withheld adjudications by omitting the third prong of *Ozkok*'s tripartite test for withheld adjudications, and nothing else. The Conference Report in relevant part states the following:

> Ozkok, while making it more difficult for [noncitizen] criminals to escape such consequences, *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*. For example, the third prong of Ozkok requires that a judgment or adjudication of guilt may be entered if the [noncitizen] violates a term or condition of probation, without the need for any further proceedings regarding guilt or innocence on the original charge. In some States, adjudication may be "deferred" upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the [noncitizen] violates probation until there is an additional proceeding regarding the [noncitizen's] guilt or innocence. In such cases, the third prong of the Ozkok definition prevents the original finding or confession of guilt to be considered a "conviction" for deportation purposes. This 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.

H.R. Conf. Rep. No. 104-828, at 224 (1996) (emphasis added).[4]

As the dissent and concurrence in *Roldan* found, this discussion reflects that Congress "specifically considered the myriad of provisions for ameliorating the effects of a conviction and acted only to remove the last prong" of the test in *Ozkok* for withheld adjudications. 22 I&N Dec. at 531 (Bd. Member Villageliu, et al., dissenting in part and concurring in part). To this end, the Conference Report confirms that when Congress codified the "conviction" definition, it all but entirely incorporated *Ozkok* and the prior common law history on the term "conviction," and it abrogated these cases only with respect to certain deferred or withheld adjudication cases.

Simply put, there is no indication in the Conference Report of any intent to include within the conviction definition dispositions that have been vacated, expunged, or otherwise eliminated through state post-conviction relief. *See* H.R. Conf. Rep. No. 104-828, at 223–24.

IV. Applicable Statutory Interpretation Principles Further Confirm That the INA Conviction Definition Does Not Include Vacated or Expunged Prior Convictions.

Application of traditional tools of statutory construction further confirms and requires finding that the conviction definition does not include prior convictions that have been vacated or expunged. The Supreme Court directs that traditional canons of construction be applied to identify Congressional intent in passing a law. *See, e.g.*, *Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). The INA is no exception, as is reflected by the Court's long history of applying interpretive canons to determine Congressional intent in the immigration context. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987) ("[e]mploying tools of statutory construction" to ascertain intent of Congress in INA provisions and citing *Chevron*, 467 U.S. at 843 n.9); *INS v. St. Cyr*, 533 U.S. 289, 319 n.45 (2001) (applying presumption against retroactivity to conviction-related provision of INA, former section 212(c)).[5]

Roldan and *Pickering* do not apply or discuss these interpretive tools that the Supreme Court instructs must be applied to identify correct statutory meaning. Proper application of interpretive canons—including the prior construction canon, federalism canon, rule of lenity, and presumption against deportation—unambiguously establish that Congress did not intend for the conviction definition to extend to convictions vacated or expunged by the States, regardless of the reasons underlying a state's post-conviction action.

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[4] The full Conference Report is attached as Appendix B.

[5] The Supreme Court has applied traditional tools of statutory construction at *Chevron* step 1, before considering deference to an agency's interpretation of a statute, to conclude that Congress' intent is unambiguous and that a suggested interpretation is foreclosed. *See, e.g.*, *Chevron*, 467 U.S. at 843 n.9 (discussing use of "traditional tools of statutory construction" in Step 1); *St. Cyr*, 533 U.S. at 319 n.45 (applying presumption against retroactivity to find no ambiguity).

A. Prior Construction Canon: In codifying the terms of art "conviction" and "formal judgment of guilt," Congress incorporated the decades of prior decisional law interpreting those terms to exclude convictions that have been vacated or expunged.

The prior construction canon provides that, when Congress has adopted language from authoritative decisional law, courts presume that Congress also intended to import the judicial and administrative interpretations of that language, unless there is clear indication to the contrary. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (explaining that "[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"). *See also, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144–46 (2000) (discussing Congress's incorporation of prior agency action by Food and Drug Administration into subsequently codified statute); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90–91 (2007) (noting Congress adopted language originally drafted by the Secretary of Education without amendment and crediting this as evidence Congress did not intend to disturb the agency's interpretation of the relevant statutory language). With respect to the INA "conviction" definition, where Congress codified the very terms of art found in prior decisional law, the canon makes apparent that Congress intended to incorporate this longstanding deference to state vacatur and expungement decisions in proceedings under the Act.

As discussed above, for decades BIA precedent deferred to state law regarding whether a disposition constitutes a conviction and generally held that vacated or expunged convictions were not convictions for immigration purposes. *See supra* Section I.A. (discussing pre-IIRIRA agency case law). In codifying the definition of "conviction" in the INA, Congress adopted almost verbatim the terms of art and language in the *Matter of Ozkok* definition with a carefully circumscribed exception for certain withheld adjudications that are not material to expunged or vacated prior convictions. *See supra* Section I.A. Congress adopted the agency's "formal judgment of guilt" conviction category without alteration. INA § 101(a)(48)(A). As the legislative history confirms, the codification of the "conviction" definition was meant only to address certain withheld adjudications, not formal judgments of guilt, and not judgments that have been expunged or vacated. *See supra* Section III. (reviewing relevant legislative history). It is apparent that Congress intended to preserve the pre-existing meaning of "conviction," which generally deferred to states' own categorization of their criminal dispositions, including for vacated and expunged convictions.

The prior construction canon requires that statutes be interpreted to be consistent with prior jurisprudence when—as here—Congress adopts the words of prior court or agency precedent in a statute that governs the same subject matter, and "in the absence of specific direction to the contrary." *Williams*, 529 U.S. at 434. The majority opinion in *Roldan* and the decision in *Pickering* fail to consider and account for prior agency and judicial construction of the conviction term, and wrongly misidentify congressional intent. In addition to the statute's plain text and legislative history, the prior construction canon makes even clearer that Congress intended to continue to make immigration consequences dependent on state disposition of criminal charges and to defer to the States on questions of convictions. *Roldan* and *Pickering* therefore must be overruled.

B. Federalism Canon: By legislating immigration consequences to depend on state convictions, Congress intended for federal immigration law to defer to state determinations regarding convictions.

The federalism canon requires that statutes be interpreted with the assumption that Congress did not mean to disturb the traditional constitutional balance between federal and state powers. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e 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."). State criminal convictions fall squarely within the States' traditional police powers to regulate their own criminal laws. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 89 (1985). In the INA, there is no statement—let alone an "unmistakably clear" statement—of intent from Congress to intrude on the States' police powers to determine whether a conviction continues to exist or has been eliminated. *See Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (discussing "plain statement" rule). To the contrary, Congress has chosen to make immigration consequences dependent on how state courts adjudicate a criminal case. Correctly understood, the statutory term does not include convictions that a state has decided to expunge or vacate.

1. Vacatur and expungement of a state conviction fall within a state's constitutional police powers to regulate their own criminal laws.

The federalism canon is rooted in the Constitution, which provides that powers that are not specifically delegated to the federal government are reserved for the States. U.S. Const. amend. X, § 8. The Constitution's reservation of a generalized police power to the States "is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000). Consistent with these federalism principles, the States are sovereign with respect to defining and enforcing their own criminal laws, including laws defining convictions and sentencing. *See id.* at 618 (describing regulation of crime as a prime example of state police power denied to the federal government and reposed in the States); *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)); *Heath*, 474 U.S. at 89 (explaining that "each State's power to prosecute is derived from its own 'inherent sovereignty, not the Federal Government'").

2. In the INA, Congress has not stated an intention to interfere with the States' constitutional police powers over their criminal laws.

"[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). With respect to the INA conviction definition, Congress did not state any intent to disturb the States' authority with respect to defining and enforcing their criminal laws. To the contrary, by requiring a criminal court's "conviction," Congress continued to make the immigration consequences of a criminal case dependent on the state's adjudication of the criminal case. *See* INA § 101(a)(48) (requiring adjudication by a state court judge or jury for a state disposition to

qualify as a "conviction"). Accordingly, the Board must recognize that § 101(a)(48)(A) defers to the States' traditional police powers over convictions.

The text of § 101(a)(48)(A) does not state any intent to include convictions that have been vacated or expunged. *See supra* Section II. The section's legislative history also does not state or indicate any intent to include vacated or expunged convictions within the conviction definition. *See supra* Section III. This silence falls far short of the "clear" statement of intent that is required to intrude on the traditional balance between federal and state powers in the realm of state criminal laws.

By construing the immigration laws to include in the "conviction" definition dispositions that have been expunged and vacated, *Roldan* and *Pickering* have disturbed fundamental state sovereignty over dispositions of charged criminal conduct, without required statutory authority.

C. Criminal Rule of Lenity: Any ambiguity in the INA "conviction" definition must be resolved in favor of the defendant, to exclude vacated and expunged convictions.

As discussed above, the statutory text and relevant legislative history unambiguously confirm that the "conviction" definition does not include convictions that have been eliminated through post-conviction action such as vacatur or expungement. *See supra* Sections II, III, IV. In the event of ambiguity on this point, such ambiguities must be resolved in favor of noncitizens under the criminal rule of lenity, to exclude vacated or expunged convictions. *Cf. Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (noting that the rule of lenity applies to a criminal statute that has both criminal and noncriminal application—including in the deportation context—and requires the Court "to interpret any ambiguity in the statute in petitioner's favor"). The rule of lenity provides that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 347–48 ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (internal quotation marks omitted)).

The rule of lenity applies to interpretation of the INA conviction definition because the INA attaches criminal penalties to prior criminal convictions, *see, e.g.*, 8 U.S.C. §§ 1324c(e)(2), 1326(b), 1327, and the definition of "conviction" applies to the entire Act, *see* INA § 101, 8 U.S.C. § 1101(a). *See, e.g.*, *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (applying rule of lenity to a tax statute with both criminal and civil application, noting the statute must have only one meaning); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., dissenting in part and concurring in part) ("Time, time, and time again, the Court has confirmed that the one-interpretation rule means that the criminal-law construction of the statute (with the rule of lenity) prevails over the civil-law construction of it[.]"), *rev'd on other grounds sub nom. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

Any ambiguities in the "conviction" definition should be resolved with the narrowest reading, which does not include those prior convictions that have been eliminated. *Cf. Crandon*

v. United States, 494 U.S. 152, 158 (1990) (describing rule of lenity as a "time-honored" rule of statutory interpretation).

D. Presumption Against Deportation: Any ambiguities in the statutory "conviction" definition must be resolved through the narrowest reading, to exclude vacated and expunged convictions.

As with the criminal rule of lenity, ambiguities in the Act are resolved in favor of noncitizens under the presumption against deportation (sometimes referred to as the immigration rule of lenity). The Supreme Court requires this principle be applied to resolve any remaining ambiguity in the text of the INA. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 449 (describing this presumption as "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]").

The Supreme Court and federal courts apply this presumption (or immigration rule of lenity) when analyzing removability and bars to relief from removal based on convictions. *See, e.g.*, *St. Cyr*, 533 U.S. at 320 (applying "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]" to interpretation of a criminal conviction bar to relief eligibility under former INA section 212(c)); *Mendez v. Barr*, 960 F.3d 80, 87 (2d Cir. 2020) (applying the immigration rule of lenity in an analysis of what constitutes a "crime involving moral turpitude" under the INA); *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) ("'[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . . . [W]e will not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used.'" (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948))); *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975) ("It is settled doctrine that deportation statutes must be construed in favor of the [noncitizen].").

CONCLUSION

A prior conviction that has been vacated or expunged no longer fits within the INA's definition of conviction and therefore may not be regarded as a conviction for purposes of immigration law. To the extent that *Roldan* and *Pickering* violate this principle, they must be overruled, and vacaturs and expungements must be recognized by federal immigration law.

APPENDIX A

INA § 101(a)(48)/8 U.S.C. § 1101(a)(48)

(A) 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.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed 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.

APPENDIX B

104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–828

ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

SEPTEMBER 24, 1996.—Ordered to be printed

Mr. HYDE, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2202]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2202) to amend the Immigration and Nationality Act to improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for the eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE; AMENDMENTS TO IMMIGRATION AND NATIONALITY ACT; APPLICATION OF DEFINITIONS OF SUCH ACT; TABLE OF CONTENTS; SEVERABILITY.

(a) SHORT TITLE.—This Act may be cited as the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996".

(b) AMENDMENTS TO IMMIGRATION AND NATIONALITY ACT.—Except as otherwise specifically provided—

(1) whenever in this Act an amendment or repeal is expressed as the amendment or repeal of a section or other provision, the reference shall be considered to be made to that section or provision in the Immigration and Nationality Act; and

review to the court of appeals for the judicial circuit in which the final administrative order was entered. The petition for review also must be filed not later than 30 days after the final order of exclusion or deportation. The new limitations on appeals in the case of claims for discretionary relief or in the case of criminal aliens, and the new rule providing for no automatic stay of removal, are to take effect in all cases for which a final order of exclusion, deportation, or removal is entered after the date of enactment. Regardless of the date of entry of the final order of exclusion or deportation, if the petition for review is filed after the Title III–A effective date, then the permanent changes made by section 306 of this bill shall apply exclusively to such petition for review.

The rules under new section 240A(d) (1) and (2) regarding continuous physical presence in the United States as a criterion for eligibility for cancellation of removal shall apply to any notice to appear (including an Order to Show Cause under current section 242A) issued after the date of enactment of this Act.

SUBTITLE B—CRIMINAL ALIEN PROVISIONS

Section 321—House section 802 recedes to Senate amendment section 161. This section amends INA section 101(a)(43) (as amended by section 440(e)) of the AEDPA (Public Law 104–132)), the definition of "aggravated felony," by: adding crimes of rape and sexual abuse of a minor; lowering the fine threshold for crimes relating to money laundering and certain illegal monetary transactions from $100,000 to $10,000; lowering the imprisonment threshold for crimes of theft, violence, racketeering, and document fraud from 5 years to 1 year; and lowering the loss threshold for crimes of tax evasion and fraud and deceit from $200,000 to $10,000. This section also adds new offenses to the definition relating to gambling, bribery, perjury, revealing the identity of undercover agents, and transporting prostitutes. It deletes the requirement that a crime of alien smuggling be for commercial advantage in order to be considered an aggravated felony, but exempts a first offense involving solely the alien's spouse, child or parent. The amendment provides that the amended definition of "aggravated felony" applies to offenses that occurred before, on, or after the date of enactment.

This section also provides, in section 321(c), that there shall be no ex post facto application of this amended definition in the case of prosecutions under INA section 276(b) (for illegal re-entry into the United States after deportation when the deportation was subsequent to a conviction for an aggravated felony). Thus, an alien whose deportation followed conviction for a crime or crimes, none of which met the definition of aggravated felony under INA section 101(a)(43) prior to the enactment of this bill, but at least one of which did meet the definition after such enactment, may only be prosecuted under INA section 276(b) for an illegal entry that occurs on or after the date of enactment of this bill.

Section 322—Senate recedes to House section 351. This section amends section 101(a) of the INA to add a new paragraph (48), defining conviction to mean a formal judgment of guilt entered by a court. If adjudication of guilt has been withheld, a judgment is nevertheless considered a conviction if (1) the judge or jury has found the alien guilty or the alien has pleaded guilty or nolo contendere

and (2) the judge has imposed some form of punishment or restraint on liberty. This section also provides that any reference in the INA to a term of imprisonment or sentence shall include any 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.

This section deliberately broadens the scope of the definition of "conviction" beyond that adopted by the Board of Immigration Appeals in Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988). As the Board noted in Ozkok, there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered "convicted" have escaped the immigration consequences normally attendant upon a conviction. Ozkok, while making it more difficult for alien criminals to escape such consequences, does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the alien's future good behavior. For example, the third prong of Ozkok requires that a judgment or adjudication of guilt may be entered if the alien violates a term or condition of probation, without the need for any further proceedings regarding guilt or innocence on the original charge. In some States, adjudication may be "deferred" upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien's guilt or innocence. In such cases, the third prong of the Ozkok definition prevents the original finding or confession of guilt to be considered a "conviction" for deportation purposes. This 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. In addition, this new definition clarifies that in cases where immigration consequences attach depending upon the length of a term of sentence, any court-ordered sentence is considered to be "actually imposed," including where the court has suspended the imposition of the sentence. The purpose of this provision is to overturn current administrative rulings holding that a sentence is not "actually imposed" in such cases. See Matter of Castro, 19 I&N Dec. 692 (BIA 1988); In re Esposito, Int. Dec. 3243 (BIA, March 30, 1995).

Section 323—Senate recedes to House section 363. This section amends section 263(a) to authorize the registration by the Attorney General of aliens who are or who have been on criminal probation or criminal parole within the U.S.

Section 324—House recedes to Senate amendment section 156(b). This section amends INA section 276(a)(1) to extend criminal liability for an alien who reenters the United States without authorization to an alien who has departed the United States while an order of exclusion or deportation is outstanding.

Section 325—House recedes to Senate amendment section 170B. This section amends section 2424 of title 18 to expand the registration requirements for those who control or harbor alien prostitutes to require earlier filing and to cover aliens of all nationalities.

APPENDIX C

AMERICAN BAR ASSOCIATION

COMMISSION ON IMMIGRATION
SECTION OF CIVIL RIGHTS & SOCIAL JUSTICE
CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association recommends the United States Department of Justice use the Attorney General certification process to withdraw certain Attorney General opinions and replace them with opinions that are consistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations, and which uphold the following well-settled legal concepts:

1. A criminal disposition should be interpreted as intended by the convicting jurisdiction, with respect for the balance between federal and state concerns, including as follows:

    a. A criminal conviction that has been vacated, expunged, or otherwise eliminated by the convicting jurisdiction is no longer a conviction for immigration purposes;

    b. A criminal sentence that has been modified by the sentencing jurisdiction will be recognized as modified and given full effect for immigration purposes; and

    c. A state's decision to reform its criminal and sentencing laws and to apply those reforms retroactively will be recognized and given full effect for immigration purposes.

2. Noncitizens remain eligible for discretionary immigration relief where criminal court record documents are incomplete or unavailable.

3. Under the categorical approach, as defined by federal appellate courts, the express language of a statute of prior conviction is sufficient to establish the least-acts-criminalized, without a further "realistic probability" showing.

4. Criminal bars to asylum and withholding of removal must comport with U.S. treaty obligations as incorporated into statutory immigration law.

REPORT

Numerous provisions of U.S. immigration laws attach immigration consequences to prior criminal arrests, convictions, and essentially any interaction with a domestic or international penal system. The list of possible immigration consequences is vast: mandatory deportation, including of lawful permanent residents; mandatory civil detention pending removal proceedings; ineligibility for lawful permanent residence through family members and through employment; ineligibility for asylum, withholding of removal, and Temporary Protected Status; ineligibility for status under the Violence Against Women Act, Trafficking Victims Protection Reauthorization Act, and Victims of Trafficking and Violence Prevention Act; sentencing enhancement in federal criminal prosecutions; and denial of naturalization.[1] The American Bar Association ("ABA") has long criticized the excessive integration of the immigration and criminal systems in the United States, and continues to strongly urge Congress to enact and the President to sign immigration reform legislation that substantially reduces the range and severity of immigration consequences of criminal system interactions.[2] In this Resolution, however, the ABA focuses on actions that may be properly taken by the United States Department of Justice ("DOJ") to rectify a body of administrative opinions previously issued by the DOJ that misinterpret and substantially, but wrongfully, expand the application of the criminal provisions of the immigration laws. These decisions improperly interpret the immigration laws in violation of congressional intent, often in violation of U.S. treaty obligations, and have resulted in hundreds of thousands of people civilly detained, deported, denied immigrations status, and criminally incarcerated.[3] Moreover, these decisions have had a disproportionately harsh and discriminatory impact on Black, Latino, and Asian immigrant communities.[4]

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[1] *See* 8 U.S.C. 1227(a)(2), INA 237(a)(2); 8 U.S.C. 1182(a)(2), INA 212(a)(2) (deportability, inadmissibility, and relief ineligibility grounds based on prior certain prior convictions and findings of criminal conduct); 8 U.S.C. 1229b(a)(3), INA 240A(a)(3) (aggravated felony bar to cancellation of removal); 8 U.S.C. 1226(c), INA 236(c) (conviction-based civil detention); 8 U.S.C. 1158(b)(2)(A)(ii), INA 208(b)(2)(A)(ii); 8 U.S.C. 1231(b)(3)(B)(ii), INA 241(b)(3)(B)(ii) (particularly serious crime bar to asylum an withholding of removal); 8 U.S.C. 1254a(c), INA 244(c) (criminal bars to Temporary Protected Status); 8 U.S.C. 1154(a)(1), INA 204(a)(1); 8 U.S.C. 1101(f), INA 101(f) (criminal bars to lawful permanent residence and cancellation of removal under VAWA); 8 U.S.C. 1255(h), INA 245(h) (criminal bars to lawful permanent residence for abused, neglected, and abandoned special immigrant juveniles); 8 U.S.C. 1326(b), INA 276(b) (enhanced federal sentences in immigration-related prosecutions for unlawful reentry into the United States); 8 U.S.C. 1427(a)(3), INA 316(a)(3); 8 U.S.C. 1101(f), INA 101(f) (criminal disqualification—in some instances, permanent—from naturalization eligibility).

[2] ABA Resolution 06M300 (urging congressional and executive actions to reduce the immigration impacts of the criminal system); ABA Resolution 12M101F (opposing "amendments" to the immigration laws that further expand the definition of "conviction").

[3] *See* Human Rights Watch, *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses* (June 16, 2015); Race Forward, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* (2011).

[4] *See, e.g.*, Carl Lipscombe, Juliana Morgan-Trostle, and Kexin Zheng, *The State of Black Immigrants: Black Immigrants in the Mass Criminalization System*, NYU Law Immigrant Rights Clinic and The Black Alliance for Justice Immigration 20 (2016) ("while Black immigrants make up only 7.2% of the unauthorized population in the U.S., they make up over 20% of all immigrants facing deportation on

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This resolution and accompanying report address the following legal questions that are germane to the often life-altering impacts that an individual noncitizen's past contact with a criminal legal system can impose on immigration status and immigration stability: 1) the meaning of the statutory term "conviction" in immigration law, when and whether it encapsulates criminal court dispositions that have been given post-conviction relief treatment by the adjudicating court, and the related questions of when and whether immigration law recognizes modifications to prior criminal sentences and retroactive sentencing reform laws, 2) proper application of the Supreme Court's categorical approach in immigration adjudications, and the improper and unfair restrictions on immigration relief where noncitizens cannot supply the immigration adjudicator with specific criminal record documents that are unavailable, 3) proper application of the Supreme Court's categorical approach in immigration adjudications, and specifically how immigration adjudicators identify the elements of a prior conviction for purposes of categorical comparison, and 4) the "particularly serious crime" bar to asylum and withholding of removal and the improper framework the DOJ has developed for making that determination. For each of these issues, this report provides legal and factual background, and a specific recommendation for the revised legal standards and rules the DOJ should establish through the adjudicative rulemaking functions of the Board of Immigration Appeals ("BIA") and the United States Attorney General ("AG") through the certification process.[5]

First, this resolution recommends that the AG certify to himself[6] the question of the scope of the definition of the statutory term "conviction"[7] in the Immigration and Nationality Act ("INA"), and issue a decision[8] holding that for purposes of the INA, the "conviction" definition does not include past offenses that have been eliminated by the adjudicating jurisdiction through expungement, rehabilitation, prospective and retroactive decriminalization of previously criminal conduct, or the court's desire to alleviate immigration hardships. The BIA already correctly recognizes that prior convictions

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criminal grounds"); *Automatic Injustice: A Report on Prosecutorial Discretion in the Southeast Asian American Community*, Southeast Asia Resource Action Center 3 (Oct. 2016) ("while 29% of other immigration deportations are based on old convictions, 78% of Southeast Asian American immigrants are in deportation proceedings because of old criminal convictions").

[5] The ABA recommends that for any legal issues addressed through the AG certification power, the certification process provide: 1) notice to the public of the AG's intent to certify the case and issue to herself, 2) identification of the specific legal questions the AG intends to review, 3) an opportunity for public comment and briefing prior to issuance of any final decision, and 4) release of the underlying decision(s) in the case. *See* ABA Resolution 19A121A.

[6] At the time this resolution and report were drafted, the Attorney General was William Barr.

[7] 8 U.S.C. 1101(a)(48)(A), INA 101(a)(48)(A).

[8] By statute and regulation, the BIA and AG may issue administrative opinions that "serve as precedents in all proceedings involving the same issue or issue." 8 C.F.R. 1003.1(g)(2)-(3). *See also* ABA Resolution 19A121A, at pg 1 of the Report.

vacated for legal defect in the underlying proceeding fall outside the INA statutory term "conviction."[9]

"Under our federal system, the States possess primary authority for defining and enforcing the criminal law."[10] Pursuant to this "usual constitutional balance between the States and the Federal Government," the states have developed multiple legal mechanisms for modifying and often ultimately eliminating a conviction for all purposes as part of the criminal adjudication process.[11] These measures have become absolutely crucial as the criminal legal and incarceration systems have ballooned over the past 40 years.[12] For most of the modern immigration era, the DOJ's administrative opinions generally recognized modifications and expungements of adjudicating jurisdictions, regardless of whether the reason for the modification or expungement was for underlying legal defect, demonstrated rehabilitation, satisfaction of sentencing requirements, or alleviating immigration hardships.[13] *See Matter of G-*, 9 I&N Dec. 159, 169 (BIA 1960, AG 1961) ("an expungement of" a noncitizen's "conviction under section 1203.4 of the California Penal Code withdraws the support of that conviction from a deportation order");[14] *Matter of Luviano-Rodriguez*, 21 I&N Dec. 235 (BIA 1996) (en banc), *rev'd on other grounds*, 23 I&N Dec. 718 (AG 2005); *Matter of F-*, 1 I&N Dec. 343 (BIA 1942); *Matter of Ozkok*, 19 I&N Dec. 546, 550 (BIA 1988) ("a conviction for a crime involving moral turpitude may not support an order of deportation if it has been expunged"); *Matter of O-T-*, 4 I&N Dec. 265 (BIA 1951) (same). Reinstating, strengthening, and rendering these decisions internally consistent will give effect to this history of decisional law that created the legislative backdrop for Congress codifying the "conviction" definition in 1996, and will respect the federalist balance between state and federal regulation of criminal

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[9] *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

[10] *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted).

[11] *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *See also 50-State Comparison Judicial Expungement, Sealing, and Set-Aside*, Restoration of Rights Project, http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/.

[12] *See* John F. Pfaff, *The Growth of Prisons: Toward a Second Generation Approach* (2007), http://ssrn.com/abstract=976373; The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-.

[13] *See* James A.R. Nafziger & Michael Yimesgen, *The Effect of Expungement on Removability of Non-Citizens*, 36 U. Mich. J.L. Reform 915, 915 (2003) ("For most of the twentieth century, a non-citizen was generally not subject to removal on the basis of a criminal conviction which had been expunged by the state that rendered the conviction.").

[14] In *Matter of G-*, the AG declined to recognize expungements in immigration cases with respect to prior narcotics convictions. The AG's distinction between narcotics and non-narcotics convictions and the effect of expungement was based on differences in the statutory scheme that have since been superseded. Under the current INA, the statutory definition of "conviction" applies to all provisions within the INA that use the term "conviction," including the provisions that attach deportability, inadmissibility, and relief ineligibility to controlled substance offenses. *See* 8 U.S.C. 1227(a)(2)(B)(i), INA 237(B)(2)(i); 8 U.S.C. 1182(a)(2)(A)(i), INA 212(a)(2)(A)(i).

and immigration law.[15] This interpretation also avoids equal protection violations by eliminating severe immigration consequences that disproportionately impact people of color protected by antidiscrimination laws.[16] Through the certification and re-decision process, the AG should rescind *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), and *Matter of Marroquin-Garcia*, 23 I&N Dec. 705 (2005), and in their place issue an opinion adopting the holding in the BIA's prior decision in *Matter of G-*, 9 I&N Dec. 159 (BIA 1960, AG 1961).

As a related matter, with respect to the immigration consequences of prior criminal sentences, this resolution further recommends the AG rescind *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018), and *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674 (AG 2019). *Matter of Thomas & Matter of Thompson* overruled the BIA's prior decisions in *Matter of Song*, 23 I&N Dec. 173 (BIA 2011), and *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), which, for immigration purposes, recognized sentencing modifications by the sentencing/conviction jurisdiction. The Board's precedents in *Song* and *Cota-Vargas* properly understood the history of immigration law recognizing sentencing modifications.[17] The two decisions also appropriately protected the federalist balance where states determine the penalties for violations of their criminal laws. For these reasons, *Thomas/Thompson* should be withdrawn. Similarly, the BIA's decision in *Matter of Velasquez-Rios* fails to recognize California's retroactive sentencing reform law for immigration purposes. In 2015, California followed several states by reforming its sentencing laws to reduce the sentencing maximum on misdemeanor offenses.[18] Under *Velasquez-Rios*, the BIA will not give effect to the portion of the California law that retroactively alters the sentencing maximum on all prior misdemeanor convictions. The decision fails to appropriately adhere to settled principles of federalism.[19]

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[15] *See* Lauren-Brooke Elsen, Brennan Center for Justice, *Criminal Justice Reform at the State Level: Most incarcerated people in America are held in state and county facilities. That is why state reform is so crucial.* (Jan. 2, 2020), https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level.

[16] *See Washington v. Davis*, 446 U.S. 229, 239 (1976) ("[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."). *See also* Karla McKanders, *Immigration and Blackness*, 44 Human Rights 20 (2019) ("America's history of immigration policies has traditionally operated to the exclusion of immigrants of color.").

[17] *See, e.g.*, *Matter of H-*, 9 I&N Dec. 380, 383 (BIA 1961); *Matter of Martin*, 18 I&N Dec. 226, 227 (BIA 1982).

[18] California Penal Code 18.5(a).

[19] "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. U.S.*, 567 U.S. 387, 399-400 (2012). *See also Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal citation omitted) ("respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action").

Second, this resolution recommends that the AG certify to himself the categorical approach legal question of whether a removable noncitizen is eligible for relief where the available components of the *Taylor/Shepard*[20] "record of conviction" do not reveal whether the noncitizen was convicted of the relief-disqualifying prong of the statute, and issue an opinion adopting the legal interpretations of the Circuit Courts of Appeals in *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc), and *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008). To the extent that *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009), is inconsistent with the reasoning of these federal courts, the AG should overrule *Almanza-Arenas* on this legal question. The Supreme Court developed the categorical approach because of its "constitutional, statutory, and equitable" underpinnings. *Mathis v. U.S.*, 136 S. Ct. 2243, 2256 (2016). For these reasons, the Supreme Court created a presumption that a person was convicted of the least-acts-criminalized under a statute of conviction.[21] At least three Courts of Appeals, including the First, Second, and Ninth Circuits[22], apply this presumption in holding that unless a statute of conviction or the conviction documents that are lawfully reviewable under the categorical or modified categorical approach prove with certainty that the noncitizen was convicted of a relief-disqualifying offense, the least-acts-criminalized presumption remains undisturbed and the noncitizen may apply for relief. Through *Almanza-Arenas* and the rule it endorses, the Board has improperly abandoned the least-acts-criminalized presumption in cases where the "record of conviction" is reviewable, but it does not reflect conviction under the relief-qualifying or relief-disqualifying prong of the statute of conviction. As these Circuit Courts of Appeals have found, this rule violates the Supreme Court's instructions on how immigration adjudicators are to apply the categorical and modified categorical approaches. In addition, as a practical and equitable matter, this holding has hugely disproportionate impact on noncitizens who are people of color and overrepresented in the criminal legal system, and on noncitizens who are detained,[23] indigent, not English-proficient,[24] or mentally and physically disabled,[25] as these

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[20] *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).

[21] *See Moncrieffe v. Holder*, 559 U.S. 184 (2013).

[22] *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc); *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008).

[23] According to one study, only 14 percent of detained noncitizens in removal proceedings are represented by counsel. *See* Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Penn. L. Rev. 1, 33 (2015). ICE detained almost 50,000 noncitizens on a given day in 2019, of which 36 percent, or over 17,000 detainees, had criminal convictions. *See* Transactional Records Access Clearinghouse, Syracuse University, Growth in ICE Detention Fueled by Immigrants With No Criminal Conviction (Nov. 2019), https://trac.syr.edu/immigration/ reports/583/.

[24] Eighty-nine percent of noncitizens (or 162,923 individuals in all) proceeded in a language other than English for immigration court cases completed in Fiscal Year 2018. *See* Executive Office for Immigration Review, U.S. Department of Justice, Statistics Yearbook, https://www.justice.gov/eoir/ file/1198896/download (data compiled for fiscal year 2018), at pg 18.

[25] "[U]p to 60,000 detained individuals with some type of mental illness face deportation each year." Fatma E. Marouf, *Incompetent But Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 Hastings L.J. 929, 937 (2014). These individuals suffer from cognitive delays, schizophrenia, bipolar disorder, or post-traumatic stress disorder. *Id.* At 936. This population struggles to

populations lack the resources to obtain complete conviction records from courts around the United States, often from cases that took place many years prior, and often in criminal courts far from the location of detention and removal proceedings.

Third, this resolution recommends that the AG certify to himself a related categorical approach question of how immigration adjudicators identify the least-acts-criminalized under a statute of conviction for purposes of the categorical comparison, and in doing so rescind *Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019); *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014); and *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016), and replace them instead with an opinion adopting the decisions of the Circuit Courts of Appeals in *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018); *Chavez-Solis v. Lynch*, 803 F.3d 10004 (9th Cir. 2015); and *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017). In a 2007 categorical approach case before the Supreme Court, the justices used the phrase "realistic probability" to deny a litigant's argument that a person can be convicted for "aiding and abetting" under California law for conduct that is beyond the federal requirements for accessory liability.[26] The Court rejected the use of "legal imagination" for identifying the least-acts-criminalized under a statute of prior conviction. The Board, through *Navarro Guadarrama* and *Ferreira*, has wrongfully interpreted the "realistic probability" and "legal imagination" language to fail to recognize conduct that convicting jurisdictions explicitly legislate as covered by a statute of conviction. Through *Mendoza Osorio*, the Board has further improperly restricted the methodology for identifying the least-acts-criminalized by refusing to recognize documents from actual arrests and prosecutions for conduct that does not trigger immigration consequences. The Board's rule, rejected by a majority of Courts of Appeals, including the First, Second, Third, Fourth, Ninth, and Tenth Circuits (and adopted by the Fifth Circuit in a sharply divided en banc opinion)[27], requires that a noncitizen (or federal defendant) produce evidence of prosecutions for conduct that does not trigger immigration consequences, even where the statute of conviction explicitly covers that conduct. This rule runs contrary to the Supreme Court's jurisprudence on the categorical approach, which has never applied the realistic probability in this manner. This rule causes the same equitable and practical flaws discussed above, by disproportionately impacting and disadvantaging noncitizens of color who are overrepresented in the criminal system, and on noncitizens who are detained, indigent, not English proficient, or mentally and physically disabled, all of whom face nearly insurmountable barriers to making the kind of evidentiary showing the Board now requires.

Fourth, this resolution recommends the AG, through the certification power, rescind three BIA decisions that bar immigration adjudicators from granting asylum and

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participate in their cases. *See generally* Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System* (2010).

[26] *Gonzales v. Duenas Alvarez*, 549 U.S. 183 (2007).

[27] *Swaby v. Yates*, 847 F.3d 62 (1st 2017); *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018); *Singh v. Attorney General*, 839 F.3d 273 (3d Cir. 2016); *Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015); *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017). *But see U.S. v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc).

withholding of removal, and replace them with administrative decisions that comply with U.S. treaty obligations as incorporated into statutory immigration law.[28] This resolution recommends rescission of *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); and *Matter of Y-L-*, 23 I&N Dec. 270 (AG 2002), which establish a framework that is in violation of U.S. treaty obligations for determining whether a person has been convicted of a "particularly serious crime" barring asylum or withholding of removal. These decisions should be replaced with an administrative opinion requiring that a "particularly serious crime" be an "offence" that is "a capital crime (murder, arson, rape, armed robbery, etc.)"[29] or "a very grave punishable act."[30] International law scholars, who are recognized experts in international refugee conventions and their treatment under U.S. law, all agree that this is the correct interpretation of the statutory term "particularly serious crime."[31]

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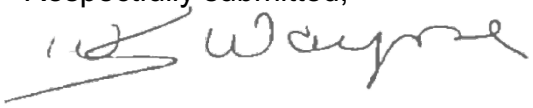
Through this resolution and accompanying report, the ABA provides a framework for the DOJ to correct a flawed body of administrative law that—without proper statutory or constitutional authority, and at times in violation of international law—has led to hundreds of thousands of people detained, deported, excluded, and denied immigration protections and status based on prior criminal arrests and convictions. This resolution would restore faith in federal agencies and in the rule of law, prevent continued discriminatory harm against communities of color, and facilitate the fair and proper functioning of the immigration system of the United States.

Respectfully submitted,



Wendy S. Wayne
Chair, Commission on Immigration
February 2021

[28] "[T]he United Nations Protocol Relating to the Status of Refugees … provided the motivation for the enactment of the Refugee Act of 1980." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987). *See also Cardoza-Fonseca*, 480 U.S. at 432-433 (citing "the abundant evidence of an intent to conform the definition of "refugee" and federal asylum law to the United Nation's Protocol to which the United States has been bound since 1968").

[29] Atle Grahl-Madsen, Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees (1963), ¶9.

[30] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1, ¶ 155 (1979, re-edited Jan. 1992).

[31] *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); Atle Grahl-Madsen, Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees (1963); UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992).

103B

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Wendy S. Wayne

1. Summary of Resolution(s). This resolution and accompanying report address the following legal matters that are germane to the often life-altering impacts that an individual noncitizen's past contact with a criminal legal system can impose on immigration status and immigration stability:

    1. A criminal disposition should be interpreted as intended by the convicting jurisdiction, with respect for the balance between federal and state concerns, including as follows:

        a. A criminal conviction that has been vacated, expunged, or otherwise eliminated by the convicting jurisdiction is no longer a conviction for immigration purposes;

        b. A criminal sentence that has been modified by the sentencing jurisdiction will be recognized as modified and given full effect for immigration purposes; and

        c. A state's decision to reform its criminal and sentencing laws and to apply those reforms retroactively will be recognized and given full effect for immigration purposes.

    2. Noncitizens remain eligible for discretionary immigration relief where criminal court record documents are incomplete or unavailable.

    3. Under the categorical approach, as defined by federal appellate courts, the express language of a statute of prior conviction is sufficient to establish the least-acts-criminalized, without a further "realistic probability" showing.

    4. Criminal bars to asylum and withholding of removal must comport with U.S. treaty obligations as incorporated into statutory immigration law.

2. Approval by Submitting Entity. Yes

3. Has this or a similar resolution been submitted to the House or Board previously? No

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

19A121A "Recommends that the Executive Office for Immigration Review amend 8

C.F.R. §1003.1(h) and establish, through rulemaking, standards and procedures for the Attorney General certification process."

06M300 "That the American Bar Association urges Congress to restore authority to state and federal sentencing courts to waive a non-citizen's deportation or removal based upon conviction of a crime, by making a "judicial recommendation against deportation" upon a finding at sentencing that removal is unwarranted in the particular case; or, alternatively, to give such waiver authority to an administrative court or agency"
"That the American Bar Association urges states, territories, and the federal government to expand the use of the pardon power to provide relief to noncitizens otherwise subject to deportation or removal on grounds related to conviction, where the circumstances of the particular case warrant it"

09A113 "That the American Bar Association supports legislation, policies, and practices that pre-serve the categorical approach used to determine the immigration consequences of past criminal convictions..."

06M101F "That the American Bar Association supports legislation, policies, and practices that allow equal and uniform access to therapeutic courts and problem-solving sentencing alternatives, such as drug treatment and anger management counseling, regardless of the custody or detention status of the individual.... That the American Bar Association urges that provisions of the Immigration and Nationality Act that are determined to be ambiguous be construed in favor of the use of rehabilitative problem-solving courts. That the American Bar Association opposes interpretations of, and amendments to, the Immigration and Nationality Act that classify participation in, or the entry of a provisional plea upon commencement of a drug treatment or other treatment program offered in relation to problem-solving courts or other diversion programs as a "conviction" for immigration purposes"

06M107C "... the American Bar Association urges an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include...the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal."

20M117 " urges the federal government to maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law"

The policy proposal would complement and support existing policy.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudications system.

8. Cost to the Association. (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.

9. Disclosure of Interest. (If applicable) No known conflict of interest exists.

10. Referrals.
Criminal Justice Section
Administrative Law Section
Labor and Employment Law
Center for Human Rights
International Law Section
StC on National Security
Judicial Division
Civil Rights and Social Justice

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Meredith A. Linsky, Director, Commission on Immigration, 1050 Connecticut Ave NW, Suite 400, Washington, DC 20036, tel 202-662-1006, meredith.linsky@americanbar.org.

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.) Wendy S. Wayne, Chair, Commission on Immigration, CPCS Immigration Impact Unit, 21 McGrath Highway, Somerville, MA 02143, tel. 508-641-9209, wwayne@publiccounsel.net.

EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution and accompanying report address the following legal matters that are germane to the often life-altering impacts that an individual noncitizen's past contact with a criminal legal system can impose on immigration status and immigration stability:

1. A criminal disposition should be interpreted as intended by the convicting jurisdiction, with respect for the balance between federal and state concerns, including as follows:

    a. A criminal conviction that has been vacated, expunged, or otherwise eliminated by the convicting jurisdiction is no longer a conviction for immigration purposes;

    b. A criminal sentence that has been modified by the sentencing jurisdiction will be recognized as modified and given full effect for immigration purposes; and

    c. A state's decision to reform its criminal and sentencing laws and to apply those reforms retroactively will be recognized and given full effect for immigration purposes.

2. Noncitizens remain eligible for discretionary immigration relief where criminal court record documents are incomplete or unavailable.

3. Under the categorical approach, as defined by federal appellate courts, the express language of a statute of prior conviction is sufficient to establish the least-acts-criminalized, without a further "realistic probability" showing.

4. Criminal bars to asylum and withholding of removal must comport with U.S. treaty obligations as incorporated into statutory immigration law.

2. Summary of the Issue that the Resolution Addresses

Numerous provisions of U.S. immigration laws attach immigration consequences to prior criminal arrests, convictions, and essentially any interaction with a domestic or international penal system. The larger solution is for Congress and the President to issue immigration reform legislation that substantially reduces the range and severity of immigration consequences of criminal system interactions. In the absence of that, this proposal focuses on actions that may be properly taken by the United States Department of Justice ("DOJ") to rectify a body of administrative opinions previously issued by the DOJ that misinterpret and substantially, but wrongfully, expand the application of the criminal provisions of the immigration laws. These decisions improperly interpret the immigration laws in violation of congressional intent, often in violation of U.S. treaty

obligations, and have resulted in hundreds of thousands of people civilly detained, deported, denied immigrations status, and criminally incarcerated.

3. Please Explain How the Proposed Policy Position Will Address the Issue

For each of these issues, this report provides legal and factual background, and a specific recommendation for the revised legal standards and rules the DOJ should establish through the adjudicative rulemaking functions of the Board of Immigration Appeals and the AG through the certification process.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

There are no minority views of which we are aware.

APPENDIX D

ADDITIONAL RESOURCES

Amicus Brief of IDP and Harvard Crimmigration Clinic in support of Petitioner in *Siriboe v. Garland* (2d Cir.) – Brief challenging *Matter of Pickering* and the BIA's construction of the "conviction" definition at 8 U.S.C. § 1101(a)(48)(A) to include vacated convictions.

Amicus Brief of Cardozo Immigrant Justice Clinic and State Appellate Defenders in support of Petitioner in *Siriboe v. Garland* (2d Cir.) – Brief arguing that convictions vacated under N.Y.P.L. § 440.10(1)(h) are not convictions for immigration purposes, consistent with *Matter of Rodriguez-Ruiz*.

Amicus Brief of IDP and Harvard Crimmigration Clinic in support of noncitizen in *In re. R-T-* (BIA) – Brief challenging *Matter of Pickering* and the BIA's construction of the "conviction" definition at 8 U.S.C. 1101(a)(48)(A) to include vacated convictions.

Amicus Brief of IDP and Harvard Crimmigration Clinic in support of noncitizen in *In re. C-* (BIA) – Brief challenging *Matter of Roldan* and *Matter of Pickering* and the BIA's construction of the "conviction" definition at 8 U.S.C. 1101(a)(48)(A) to include vacated convictions.

Amicus Brief of AILA, IDP, et al. in support of Petitioner in *Zaragoza v. Garland* (7th Cir., pending) (Amicus counsel Nadia Anguiano-Wehde, University of Minnesota Law School) – Brief challenging *Matter of Thomas & Thompson* and its construction of the definition of "sentence," 8 U.S.C. 1101(a)(48)(B), to exclude resentencing.

Amicus Brief of AILA, IDP, et al. in support of Petitioner in *Pacheco Vega v. Att'y Gen.* (3d Cir.) – Brief challenging *Matter of Thomas & Thompson* and its construction of the definition of "sentence," 8 U.S.C. 1101(a)(48)(B), to exclude resentencing.

Amicus Brief of IDP et al. in support of Petition for Rehearing in *Velasquez-Rios v. Barr* & *Desai v. Barr* (9th Cir. 2020) – Brief challenging *Matter of Velasquez-Rios* and its decision not to give effect to a retroactive state resentencing law.

IDP Practice Advisory: *The Conviction Finality Requirement in Light of Matter of J.M. Acosta* (Jan. 24, 2019) – Practice advisory on the related question of the conviction finality requirement for immigration purposes, with comprehensive treatment of using statutory construction principles in INA "conviction" definition cases.

Amicus Brief of IDP in support of Petitioner in *Arias Jovel v. Garland* (9th Cir.) – Brief challenging *Matter of Roldan* and *Matter of Pickering* and the BIA's construction of the "conviction" definition at 8 U.S.C. § 1101(a)(48)(A) to include vacated convictions.

IDP Practice Advisory: Post-Conviction Relief State Summary Chart – This chart provides immigration attorneys with an overview of post-conviction relief (PCR) vehicles in selected states and the federal courts..

Additional resources on working with and litigating post-conviction relief in state court, available at www.immigrantdefenseproject.org/what-we-do/padilla-post-conviction-relief/.