NON-DETAINED

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

In the Matter of: [redacted]C[redacted]	)	**File No: A**[redacted]
In removal proceedings	)	

REQUEST TO APPEAR AS *AMICI CURIAE* IN RESPONSE TO AMICUS INVITATION NO. 22-16-03

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

Philip L. Torrey
Tiffany J. Lieu
Rachel Landry, *Supervised Law Student*
Lydia Ghuman, *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

Counsel for Amici Curiae

REQUEST TO APPEAR AS *AMICI CURIAE*

Pursuant to 8 C.F.R. § 1292.1(d), the Harvard Law School Crimmigration Clinic and the Immigrant Defense Project ("IDP") (collectively, "*Amici Curiae*"), respectfully request permission to appear as *amici* in response to BIA Amicus Invitation No. 22-16-03 and to file the accompanying brief.

Amici Curiae are organizations with expertise concerning the intersection of criminal law and immigration law and therefore have a direct interest in the outcome of these proceedings.

The Harvard Law School Crimmigration Clinic teaches law students how to advocate for the advancement of immigrants' rights—particularly those impacted by the criminal law system. The Clinic engages in direct representation, policy advocacy, and impact litigation at the intersection of criminal law and immigration law. Scholarly articles produced by the Clinic's staff and faculty have been published in various law journals, including on the conviction definition and vacaturs at issue in these proceedings. The Clinic has filed briefs as amicus curiae on similar issues before the U.S. Supreme Court, the federal courts of appeals, the Board of Immigration Appeals, and various international tribunals.

IDP is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. *Amicus* IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights. *Amicus* IDP has filed briefs on these issues before the U.S. Supreme Court,

the federal courts of appeals, the Board of Immigration Appeals, and various international tribunals. *See, e.g.*, *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief); *Marinelarena v. Barr*, 930 F.3d 1039, 1053 n.10 (9th Cir. 2019) (citing IDP brief); *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007).[1]

Dated: April 27, 2022

Respectfully submitted,

Tiffany J. Lieu
Philip L. Torrey
Crimmigration Clinic
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

[1] Pursuant to Amicus Invitation No. 22-16-03, this Court will serve the parties with a copy of the enclosed brief if the Court accepts it. Undersigned counsel has therefore not served a copy of the proposed brief on either party.

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In the Matter of: [redacted] **C**[redacted]	)	**File No: A**[redacted]
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PROPOSED BRIEF OF AMICI CURIAE THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF RESPONDENT

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

Philip L. Torrey
Tiffany J. Lieu
Rachel Landry, *Supervised Law Student*
Lydia Ghuman, *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

Counsel for Amici Curiae

[redacted]

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INTRODUCTION

Removal proceedings must be reopened when the criminal conviction underlying a removal order or barring immigration relief is vacated. The Immigration and Nationality Act ("INA") demands it and federalism principles upon which the United States is founded require it. To do otherwise would violate the INA's text and structure while undermining the carefully crafted balance of power between states and the federal government.

In this brief, *amici curiae* demonstrate that the removal proceedings in this case must be reopened regardless of any time or numerical bar applicable to a motion to reopen. A vacated conviction simply ceases to exist, and no part of the INA authorizes removal based on a voided conviction. If the Board of Immigration Appeals ("BIA" or "Board") refuses to reopen proceedings—either by its own accord or via a party's motion—it is consenting to the removal of an individual based on a legal nullity. When the BIA allows removal based on a vacated conviction, just as it would a conviction that has not been vacated, then it fails to give proper deference to the state criminal court. When a state criminal court vacates a conviction it is operating at the zenith of a state's constitutional Police Powers, and nothing in the INA authorizes the BIA to undermine that authority by ignoring the vacatur.

ARGUMENT

I. CONGRESS WROTE THE INA TO DEFER TO STATE COURT JUDGMENTS IN CRIMINAL CASES.

While federal immigration law governs the immigration consequences of a prior state disposition that is a conviction, Congress structured the law to defer to state criminal court judgments as to whether or not a state disposition constitutes a conviction. That intent is confirmed by the plain text and legislative history of the INA's conviction definition, the context and structure of the INA, and other canons of statutory interpretation—all of which establish that

a vacated conviction no longer exists for federal immigration purposes and cannot impose the associated consequences of the INA's conviction definition.

To the extent that the BIA has held that the statutory definition of conviction includes any vacated convictions, it is violating the INA. *See 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) (holding that state convictions remain convictions for immigration purposes, unless the vacatur relates to a "procedural or substantive defect" in the underlying criminal proceedings).

A. Congress Chose To Predicate Immigration Consequences Of A Criminal Case On State Criminal Court Judgments.

Deference to state dispositions of their criminal laws has long been the lynchpin for determining when a state action qualifies as a conviction for immigration purposes. For most of the twentieth century, the Board and federal courts deferred to the States' determinations as to whether a state disposition was sufficiently final to be considered a conviction and thus 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) (hereinafter "Torrey").

Under decades-long jurisprudence developed at common law, federal adjudicators required convictions for immigration purposes to include a final judgement of guilt. To determine whether this requirement was met, adjudicators deferred to a state's criminal procedure laws to assess when a disposition was considered a conviction. *See* Torrey at 12. So too for vacaturs. *See also Lujan-Armendariz v. INS*, 222 F.3d 728, 739 (9th Cir. 2000), *overruled on other grounds by Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) ("[T]he BIA held as early as 1951 that offenses for crimes expunged under state rehabilitation laws would not count as convictions for deportation purposes."). If the disposition was sufficiently final, then federal adjudicators would likely consider it a conviction for immigration purposes. *See* Torrey at 10;

see also Pino v. Landon, 349 U.S. 901, 901 (1955) (per curiam) (holding that a Massachusetts disposition had not "attained such finality as to support an order of deportation" under the INA where the charges were only put "on file" following finding of guilt).

In deferring to the States on what qualified as a conviction, it followed that the Board and courts also recognized state vacaturs. *See, e.g.*, *Matter of Sirhan*, 13 I&N Dec. 592, 600 (BIA 1970) ("[W]hen a court acts within its jurisdiction and vacates san original judgment of conviction, its action must be respected."). Immigration law deferred to the States both with respect to the validity of a state conviction in the first instance and its subsequent vacatur. *See, e.g.*, *Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9th Cir. 1990) (holding that, in federal immigration proceedings, "state law properly applies to the validity of the conviction" and that "it offends no sense of symmetry to hold that a state's action vacating and totally nullifying that conviction should render the deportation not legally executed").

In 1988, the Board sought to make the finality requirement compatible with differing state criminal procedures. *See Matter of Ozkok*, 19 I&N Dec. 546, 550 (BIA 1988). In *Matter of Ozkok* the Board 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 guilt or innocence. *Id.* at 551–52. In so doing, the Board continued to affirm deference to state criminal court determinations. *See Lujan-Armendariz*, 222 F.3d at 741(quoting *Matter of Ozkok*, 19 I&N Dec. at 552) ("Notably, the Board's decision in *Ozkok* left intact the longstanding rule that, in general, a conviction 'may not support an order of deportation if it has been expunged.'").

In 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRAIRA"), which amended the INA to codify for the first time a statutory definition of conviction. In so doing, Congress codified the first two prongs of the *Matter of Ozkok* test verbatim. *See* INA § 101(a)(48)(A). Congress abrogated the *Matter of Ozkok* test in only one specific way: cases involving a deferred or withheld adjudication would nevertheless be regarded as a conviction under the INA. *Compare* INA § 101(a)(48)(A), *with Matter of Ozkok*, 19 I&N Dec. at 551–52. That decision was deliberate. Congress did nothing to otherwise abrogate deference to the States on criminal court judgments, and certainly did nothing to abrogate such deference in cases involving vacated convictions.

B. The Plain Text Of The INA Unambiguously Does Not Include Vacated Convictions.

The plain text of the INA's conviction definition confirms that Congress intended to continue deferring to state court judgments of their criminal dispositions. There are "two alternative tests" for a disposition to fall within the conviction definition at INA § 101(a)(48): where there is a formal judgment of guilt, and certain deferred and withheld adjudications. *See* Torrey at 19. Neither test can be understood to encompass vacated convictions. The plain text does not include vacated convictions, nor does the plain meaning of the word conviction.

The first way to satisfy the conviction definition is a "formal judgment of guilt of the [noncitizen] entered by a court." INA § 101(a)(48)(A). Where a conviction has been vacated, it cannot satisfy this first test. A vacated conviction is not a "formal judgment of guilt," since it is a disposition signifying the *absence* of a conviction (the prior judgment of guilt having been eliminated). Dictionary definitions support this reading. *Cf. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) (consulting "reliable dictionaries" to identify statutory meaning). Generally, a conviction is defined as "legal proof or declaration of guilt." *Conviction*, OXFORD

ENG. DICTIONARY. To vacate means "[t]o make void in law; to deprive of legal authority or validity." *Vacate*, OXFORD ENG. DICTIONARY; *see also* BLACK'S LAW DICTIONARY (11th ed. 2019) (*vacate* ("1. To nullify or cancel; make void; invalidate<the court vacated the judgment.>"); *formal* ("1. Of, or relating to, involving established procedural rules, customs, and practices."); *judgment* ("2. A court's final determination of the rights and obligations of the parties in a case."); *guilt* ("The fact, state, or condition of having committed a wrong, esp. a crime; esp., a judicial finding to this effect.")); *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."). A vacated conviction is not a formal judgment of guilt and Congress has done nothing in the INA's conviction definition to abrogate this common understanding.

The second way to satisfy the statutory conviction definition involves cases where the formal adjudication of guilt is withheld. In such cases, two elements must be satisfied: "(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 guilty" 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)(i)–(ii). A vacated conviction cannot fall under this second test because it requires that a formal adjudication of guilt is *withheld*; but a vacated conviction requires a formal adjudication of guilt that is subsequently invalidated. *See Lujan-Armendariz*, 222 F.3d at 734 n.11 ("[U]nder a deferred adjudication statute there is no conviction to expunge, as no conviction is ever entered.").

"It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) (internal

citation omitted). The INA's conviction definition does not mention vacated convictions. *See* INA § 101(a)(48)(A). Vacated convictions therefore cannot be read into this statutory silence. It is apparent that, when Congress codified the conviction definition, it did so with the legal and common understanding that it would not include a conviction that has been vacated and ceases to exist. The plain text of the INA, as supported by the plain meaning of the term "conviction," cannot be understood to include vacated convictions in the definition of a conviction for immigration purposes.

C. The Legislative History Further Confirms That The 1996 Congress Did Not Intend To Include Vacated Convictions In The Conviction Definition.

As discussed *supra*, the plain text of the INA and decades-long decisional law make clear that, when Congress codified the conviction definition in 1996, it intended to only deviate from deferring to state courts in cases of certain withheld or deferred adjudications. Congress never intended to deviate from deferring to states for formal judgments of guilt that have been vacated by the States. The INA's legislative history further confirms this point.

In codifying the conviction definition, Congress adopted the first two prongs of the *Matter of Ozkok* test verbatim, eschewing only the third prong. *See supra* Section I.A. In the House Conference Report to IIRAIRA, Congress explained its elimination of the third prong:

> 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) ("Joint Explanatory Statement") (emphasis added). It is apparent that Congress' *only* intended modification to the *Matter of Ozkok* test was for withheld and deferred adjudications. To this end, the House Conference Report confirms that when Congress codified the conviction definition, Congress all but entirely incorporated *Matter of Ozkok* and the prior common law history on the term "conviction," and abrogated these cases only with respect to certain deferred or withheld adjudication cases. *See also Lujan-Armendariz,* 222 F.3d at 745 (explaining that the "purpose of" codifying the conviction definition "appears to have been to establish the time at which *a particular type of proceeding, specifically, deferred adjudication,* results in a conviction for immigration purposes") (emphasis added). By contrast, there is no evidence in the Congressional record of any intent to expand the conviction definition to include vacated convictions. *See id.* (explaining that Congress's purpose in codifying the conviction definition was "not to alter the long-standing rule that a conviction entered but subsequently vacated or set aside cannot serve as the basis for a deportation order").

D. The Structure Of The INA Shows That It Is Designed To Defer To State Judgements, Particularly On Questions Of Criminal And Family Law.

Recognizing state vacaturs of criminal convictions is consistent with the structure of the INA. *See Pereida v. Wilkinson*, 141 S. Ct. 754, 761 (2021) ("What the statute's text indicates, its context confirms."). The INA relies upon, and defers to, state law in several areas.

For example, the INA looks to state law definitions of prior state convictions in determining whether the conviction triggers a ground of removal. *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). In so doing, courts regularly defer to state interpretations of their own penal codes, including referring to state court precedents, state jury instructions, and sometimes certifying questions directly to the highest state court. *See, e.g.*, *Lopez-Valencia v. Lynch*, 798

F.3d 863, 868 (9th Cir. 2015) (considering jury instructions and state court precedents); *Romero-Millan v. Barr*, 958 F.3d 844, 849 (9th Cir. 2020) (explaining that "we look to authoritative sources of state law such as state court decisions and the wording of the statute in question," and certifying questions about the interpretation of Arizona's drug paraphernalia statute to the Arizona Supreme Court).

The INA also looks to state determinations with respect to matters of family law, such as child custody and marriage. For example, under INA § 320(a), automatic citizenship for adopted children born outside the United States requires, among other things, that "the child is residing in the United States in the legal and physical custody of the citizen parent." INA § 320(a)(3). The INA defers to state determinations with respect to "legal and physical custody." *See, e.g.*, *Tabucbuc v. Ashcroft*, 84 F. App'x 966, 969 (9th Cir. 2004) (looking "presumptively" to state law "to determine whether [the child born outside the United States] was in the legal custody of his father"). With respect to marriage, the immigration laws hold "[g]enerally [that] the validity of a marriage is determined according to the law of the place of celebration." *Matter of Gamero*, 14 I&N Dec. 674, 674 (BIA 1974).

Immigration law also relies on state court and agency determinations in adjudicating Special Immigrant Juvenile ("SIJ") status and U Nonimmigrant ("U visa") status applications. *See* INA § 101(a)(27)(J)(i)–(ii) (SIJ); INA § 101(a)(15)(U)(i)(III) (U visa). With respect to SIJ, the USCIS Policy Manual explains that "USCIS relies on the expertise of the juvenile court in making child welfare decisions and does not reweigh the evidence to determine if the child was subjected to abuse, neglect, abandonment, or a similar basis under state law." USCIS Policy Manual, pt. J, ch. 2(D) (last updated April 7, 2022); *see also C.J.L.G. v. Barr*, 923 F.3d 622, 626 (9th Cir. 2019) ("A child seeking SIJ protection must first obtain a state-court order declaring

him dependent or placing him under the custody of a court-appointed 'individual or entity.'" (quoting INA § 101(a)(27)(J)(i))). With respect to U visa applications, adjudicators afford "significant weight" to a certifying form federal, state, or local law enforcement regarding the applicant's helpfulness in a criminal investigation. *Perez Perez v. Wolf*, 943 F.3d 853, 858 (9th Cir. 2019) (quoting 72 Fed. Reg. 53014 (Sept. 17, 2007) (interim rule)).

Consistent with this structure, Congress wrote the INA to defer to state court determinations in cases of conviction vacaturs.

E. Federalism Canon: Congress Wrote The Conviction Definition To Continue Deferring To State Criminal Court Judgments Vacating Convictions.

Foundational federalism principles further confirm that the INA's conviction definition excludes state-vacated convictions. It is axiomatic that the U.S. Constitution reserves any powers not specifically enumerated to the federal government for the States. *See* U.S. Const. amend. X, § 8. These state police powers are "deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000). Fundamental to such powers is that the states are sovereign with respect to the enforcement of their own criminal laws. *Heath v. Alabama*, 474 U.S. 82, 89 (1985). Inherent in their sovereignty over their criminal laws is the power, as the Supreme Court has repeatedly recognized, "to determine what shall be an offense against its authority and to punish such offenses." *Id.*; *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 and citation omitted)); *Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 770 (9th Cir. 2017) (same); *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018) (explaining that the "Tenth Amendment confirms" that the authority to define offenses and convictions under state law are "legislative power[s] . . . reserved for the States.").

Accordingly, the Supreme Court forbids encroachment on the States' police powers without an "unmistakably clear" statement of intent from Congress. *Gregory v. Ashcroft*, 501 U.S. 452, 452 (1991). While Congress is not 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." *Id.* at 460. "[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." *United States v. Bass*, 404 U.S. 336, 349 (1971).

In *Gregory*, the Supreme Court upheld a Missouri law setting the mandatory retirement age for state judges despite a challenge under the federal Age Discrimination in Employment Act ("ADEA"). The Court held that the state judiciary is an area "of the most fundamental sort for a sovereign entity" and there was no plain statement that Congress intended for the federal law to apply. *Gregory*, 501 U.S. at 455–60. So too here. The States' criminal law dispositions fall squarely within their constitutional police powers. State dispositions at issue in federal immigration proceedings implicate this fundamental realm of state sovereignty over their own criminal laws. Just as the Court found that Congress did not speak plainly as to its intent to encroach on the state judiciary under the ADEA in *Gregory*, here, Congress has not spoken plainly as to its intent to encroach on state authority over criminal vacatur judgments. The statutory text does not mention vacated convictions, nor do the two statutory tests for satisfying the conviction definition include vacated convictions. *See supra* Section I.B. The legislative history is equally silent as to vacated convictions. *See supra* Section I.C. Such silence hardly constitutes the sort of "unmistakably clear" statement of congressional intent that the Supreme Court requires for the federal government to encroach on the States' police powers. By contrast,

Congress spoke directly to its intent to include certain deferred and withheld adjudications in the conviction definition. *See supra* Section I.C. This direct statement evidences that where Congress wished to alter the balance of powers between the States and federal government, it knew how to do so.

The absence of a clear statement with respect to vacaturs in INA § 101(a)(48)(A) is all the more telling given the presence of clear statements elsewhere in the U.S. Code on this very issue. 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). Given the absence of a clear statement, "conviction" must be interpreted to exclude prior convictions that have been vacated to avoid intruding on the fundamental state function of defining crimes and punishment.

"[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." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted); *see also Knox v. Brnovich*, 907 F.3d 1167, 1174 (9th Cir. 2018) ("Th[e] presumption against preemption applies when a state regulates in an area of historic state power even if the law touche[s] on an area of significant federal presence." (internal quotation and citations omitted)). With respect to the INA and the conviction definition, the presumption stands because Congress has not clearly indicated its intent "to regulate" in this "area[] traditionally supervised by the States' police

power." *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006). Accordingly, the INA must be interpreted to continue the long history of deference to State criminal law determinations.

F. Prior-Construction Canon: When Congress Codified The Conviction Definition, It Incorporated The Decades Of Decisional Law Deferring To State Criminal Court Judgments.

Congress does not legislate on a blank slate. Accordingly, under the prior-construction 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 the Board and courts adhere to the decades-long practice of deferring to the States' criminal law judgments.

Here, as discussed *supra*, federal immigration law has a long history of deferring to the States' criminal law judgments. *See supra* Section I.A. Congress was aware of these decades of jurisprudence when it enacted the statutory definition of conviction in 1996—indeed, it adopted the first two prongs of *Matter of Ozkok*'s three-part test verbatim. *See supra* Section I.C. In so doing, Congress demonstrated its intent to preserve the decades-long deference to the States' criminal law judgments, including vacated convictions. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530–31 (1998) (holding that, where statutory text is "taken virtually verbatim" from judicial precedent, Congress intended to codify such precedent).

Accordingly, vacated convictions continue to fall outside the INA's definition of conviction and cannot continue to impose conviction-based immigration consequences.

G. Rule Of Lenity: Any Ambiguity In The Meaning Of The Statutory Conviction Definition Would Be Resolved In Favor Of Noncitizens.

Any ambiguity in the statutory conviction definition must be construed in favor of noncitizens under the rule of lenity to exclude vacated convictions. 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 U.S. at 348–49 (citation omitted). The rule is based on the principle 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 in the cases of dual civil-criminal application statutes like the INA. The INA attaches criminal penalties to prior criminal convictions,[1] and the definition of conviction applies to the entire act, *see* INA § 101(a). *See Leocal v. Ashcroft,* 543 U.S. 1, 11 n.8 (2004) (explaining that the rule of lenity would apply to the definition of the "crime of violence" under the INA "whether we encounter its application in a criminal or noncriminal context," because courts "must interpret the statute consistently"); *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]"); *Lisbey v. Gonzales,* 420 F.3d 930, 933 (9th Cir. 2005) (acknowledging that the rule of lenity could apply to the INA but finding no need to apply it in the case at issue).

It is implausible to understand the conviction definition as unambiguously including vacated convictions. And as discussed *supra*, the INA's plain text, plain meaning, legislative history, and structure unambiguously confirm the opposite: that the conviction definition at INA § 101(a)(48)(A) does not include vacated convictions. *See supra* Sections I.A–C. Applying interpretive canons further confirm this unambiguous reading. *See supra* Sections I.D–F. But

[1] *See, e.g.*, 8 U.S.C. §§ 1326(b) (imposing enhanced penalties for individuals who unlawfully reenter the United States and were previously removed based on certain convictions); 1324c(e)(2) (imposing up to 15 years imprisonment for individuals convicted of concealing assistance in preparing an application for immigration benefit).

should the statute be read to contain any ambiguities on this point, they would be resolved in favor of noncitizens under the rule of lenity. The INA's conviction definition does not include vacated convictions and must be read accordingly.

II. UNDER THE STATUTE, REGULATIONS, AND GOVERNING CONSTITUTIONAL PRINCIPLES, THE BOARD MUST REOPEN PROCEEDINGS IN CASES WHERE THE CONVICTION UNDERLYING REMOVABILITY OR INELIGIBILITY FOR RELIEF HAS BEEN VACATED.

Denial of a motion to reopen premised on the vacatur of a criminal conviction frustrates the INA, federalism and comity, and other constitutional concerns. The Board accordingly must grant such motions to reopen through either equitably tolling the statutory filing deadline or exercising its regulatory *sua sponte* authority to reopen proceedings.

A. The Motion To Reopen Statute And Regulations Do Not Show Any Congressional Intent To Abrogate Deference To State Criminal Court Judgments.

Congress wrote the INA to defer to state court judgments as to whether a state criminal disposition constitutes a conviction. *See supra* Section I. Nothing in the motion to reopen provision or other relevant provisions abrogates that deference. The motion to reopen statute provides that a noncitizen "may file one motion to reopen proceedings." INA § 240(c)(7). The motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted." *Id.* Critically, the motion to reopen provision nowhere limits the types of new facts that are cognizable for reopening purposes, nor does it say that conviction vacaturs do not constitute a new fact for reopening purposes. *Id.* The provision is further silent about limiting the States' police powers over their own criminal laws or abrogating the long history of immigration law's deference to state criminal law determinations. The motion to reopen regulations are similarly silent. *See generally* 8 C.F.R. § 1003.23. This statutory and regulatory silence falls far short of

the "unmistakably clear" statement of congressional intent required to alter the carefully delineated balance between the federal government and the States. *See supra* Section I.E.

Indeed, the INA and its implementing regulations suggest the opposite. Under the regulations, a motion to reopen should be granted where "evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.23(b)(3). Subsequent elimination of the conviction that formed the sole basis for removability is precisely the type of determinative, previously unavailable fact that Congress contemplated in creating the reopening mechanism. This is because a removal order is valid only where "it is based upon reasonable, substantial, and probative evidence," including evidence that the individual has a removable conviction. INA § 240(c)(3)(A). As the Supreme Court has repeatedly held, "[t]he motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*, 558 U.S. 233, 241 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)). Thus, where a removal order is based on a conviction that has since been vacated, reopening removal proceedings effectuates congressional intent to prevent unlawful removal orders.

B. In Addition To Constitutional Principles Of Federalism, Comity Requires That The Board Reopen Proceedings In Cases Where The Conviction Underlying Removability Or Statutory Relief Eligibility Has Been Vacated.

The Board's failure to give effect to a state's vacatur of a conviction by denying a motion to reopen proceedings based on that vacatur disregards the fundamental principles of comity underlying federalism. As the Supreme Court has long held, comity requires "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state government." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Comity and our federalist system mandates that the federal government "always endeavors to [act] in ways that will not unduly interfere with the legitimate activities of the States." *Id.*; *see also supra* Section

I.E. (establishing that principles of federalism confirm that Congress legislated the conviction definition to continue to defer to state criminal law determinations).

Treating vacated convictions as convictions still on the books would upend this balance between federal and state powers ingrained in our constitutional norms of comity and federalism. Indeed, doing so would attach severe consequences (e.g., deportation, detention, enhanced criminal sentences) to convictions the States deliberately saw fit to quash and prevent future legal consequences from following. Doing so would also interfere with the States' constitutionally-recognized public safety and health policy goals in vacating and eliminating prior convictions. *Cf.* Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. Cal. Interdisc. L.J. 395, 397–98 (2016) (providing as an additional example, that states vacate convictions to eliminate barriers to employment, another State police power); *Medtronic, Inc.*, 518 U.S. at 475 ("Because [state police powers] are primarily, and historically, . . . matter[s] of local concern . . . the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." (internal quotation marks and citation omitted)).

To persist with a removal order premised on a conviction that has been vacated offends principles of comity embedded in our federalist system. As such, the Board must reopen removal proceedings in such cases.

C. Constitutional Due Process And Equal Protection Concerns Also Militate In Favor Of Reopening Removal Orders Based On Eliminated Convictions.

Failing to reopen proceedings where the removal order was based on a conviction that has since been vacated would violate the Fifth Amendment's guarantee of due process and equal protection.

To begin, continuing to enforce the legal effects of a removal order whose entire premise has been nullified would violate the Fifth Amendment guarantee that no person "shall be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V; *see also Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (stating that noncitizens "shall not be . . . deprived of life, liberty, or property without due process of law"). To impose the "serious burden" of deportation based on a conviction vacated by the convicting jurisdiction, and absent congressional authorization to do so, strikes at the heart of protections the Due Process Clause was written to safeguard. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006) (finding that an individual who had previously been deported had demonstrated that the removal order was "fundamentally unfair" under the due process clause because he "was removed when he should not have been"). The consequences of executing erroneous removal orders are particularly stark in cases in which a noncitizen seeks protection from persecution through asylum, withholding of removal, or protection under the U.N. Convention Against Torture. Deporting an individual to their country of origin in such circumstances may lead to severe and often fatal harm; and executing such a sentence based on a removal order that is legally null because its sole predicate—a conviction that has subsequently been vacated—is nonexistent, erroneously deprives an individual of life. *Cf. Nken*, 556 U.S. at 436 ("[T]here is a public interest in preventing [noncitizens] from being wrongfully removed, particularly to countries where they are likely to face substantial harm."). Failing to reopen proceedings in these cases would deprive individuals of life and liberty in violation of Due Process.

Continuing to enforce the legal effects of a removal order in such cases would also violate the equal protection guarantee. The Fifth Amendment's Due Process Clause "prohibit[s]

the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)); *United States v. Windsor*, 570 U.S. 744, 774 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."). Federal discrimination based on race is precisely the type of discrimination that the Fifth Amendment prohibits. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995) (affirming that, under the Fifth Amendment, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny" to "ensure that the *personal* right to equal protection of the laws has not been infringed"). Continuing to attach severe immigration consequences to vacated convictions will almost exclusively impact Black and Latinx immigrants, who are disproportionately affected by the criminal justice and immigration systems, and accordingly violate constitutional equal protection.

It is well-established that "Black people are more likely than any other group in the United States to be arrested, convicted, and imprisoned in the criminal enforcement system." Alina Das, No Justice in the Shadows: How America Criminalizes Immigrants 85 (2020) (hereinafter "No Justice"). Black men comprise 13% of the male population in the United States, but represent about 35% of those who are incarcerated with a sentence of more than one year. Elizabeth Hinton et al., An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System, Vera 2 (May 2018). Black immigrants are similarly more likely to be targeted for deportation. Black immigrants comprise only 5.4% of the unauthorized population in the U.S. and 7.2% of the total noncitizen population. But, they make up 20.3% of immigrants facing deportation on criminal grounds. The State of Black Immigrants, Black Alliance for Just

Immigration (2020), *available at* https://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf (last visited Apr. 26, 2022). More than one out of every five noncitizens in deportation proceedings based on criminal grounds is Black. *Id.* Moreover, Black immigrants are more likely to be deported based on a criminal-system-based ground of removal as compared to other immigrants. In 2013, more than 75% of Black immigrants were removed on criminal-system-based grounds, whereas less than half of immigrants overall were removed on such grounds. *Id.*

Latinx immigrants are similarly disproportionately affected by the criminal and immigration enforcement systems. One study of the "Criminal Alien Program" found that 92.5% of individuals deported through the program were from Mexico, Honduras, Guatemala, and El Salvador, "even though people from those countries make up less than half the noncitizen population in the United States." Das, No Justice, at 83.

Courts have found such numbers indicative of disparate impact. *See Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 498, 505–06 (9th Cir. 2016) (finding disparate treatment where a concentration of low-income housing was in neighborhoods that were 75% Hispanic); *The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 704 (9th Cir. 2009) (finding disparate impact where 71% of Latino areas were excluded from benefits while extending benefits to areas that were only 47% Latino).

Statutes like the INA must be construed "so as to avoid not only the conclusion that [they are] unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *see Zadvydas v. Davis*, 533 U.S. 678, 689 (stating that statutes should be read "in order to avoid their constitutional invalidation"). Here, to avoid grave due process and equal protection violations, the INA must be construed to mandate reopening removal proceedings where the sole basis of removal was a conviction that has since been vacated.

D. The Board Must Reopen Proceedings In These Instances, And Two Procedural Mechanisms For Doing So Are The Motion To Reopen Statute And Equitable Tolling, Or the Board's *Sua Sponte* Authority Under The Regulations.

A removal order premised on a vacated conviction is "null and void" *ab initio*. *See United States v. Krueger*, 809 F.3d 1109, 1123 (10th Cir. 2015) (Gorsuch, J., concurring) (explaining that a warrant that exceeded statutory limitations "treated as no warrant at all—as *ultra vires* and void *ab initio*"—in other words, "null and void"); *see also United States v. Henderson*, 906 F.3d 1109, 1117 (9th Cir. 2018); *United States v. Werdene*, 883 F.3d 204, 213 (3d Cir. 2018); *United States v. Horton*, 863 F.3d 1041, 1048 (8th Cir. 2017). Where the proof of conviction relied on for a removal order has been fatally undermined by vacatur of conviction, there is no longer the statutorily required "reasonable, substantial, and probative evidence" of removability. INA § 240(c)(3)(A). To perpetuate a removal order in such a circumstance violates the INA. *See also supra* Section I (establishing that the INA does not authorize vacated convictions to continue to impose associated legal consequences).

As a practical matter, to effectuate reopening in such cases the Board may use, *inter alia*, either of the two following procedural mechanisms: equitable tolling of the statutory deadline as recognized by the federal courts, including the Ninth Circuit,[2] or through exercise of the Board's *sua sponte* authority at 8 C.F.R. § 1003.2(a). The Board routinely grants motions to reopen under either mechanism based on vacated convictions. *See, e.g.*, *Matter of Reynadlo Ibarra Casarez*, AXXXX5476, 2006 WL 3922304, at *1 (BIA Dec. 26, 2006) (holding that "[s]ince the reason for finding that the respondent was removable no longer exists" where the underlying conviction

[2] Courts universally hold that the motion to reopen statutory deadline is subject to equitable tolling. *See, e.g.*, *Valeriano v. Gonzales*, 474 F.3d 669, 673 (9th Cir. 2007); *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1363 (11th Cir. 2013) (en banc); *Harchenko v. INS*, 379 F.3d 405, 410 (6th Cir. 2004); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Iavorski v. INS*, 232 F.3d 124, 130 (2d Cir. 2000); *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016).

had been vacated, "the respondent has demonstrated exceptional circumstances justifying *sua sponte* reopening"); *Matter of Jose Augustin Fernandez,* AXXXXX2625, 2017 WL 1951529, at *1 (BIA Apr. 6, 2017) (granting motion to reopen under 8 C.F.R. § 1003.2(a) where conviction was vacated by state court); *Matter of Paulo Do Rosario,* AXXXXX5816, 2010 WL 4035430, at *1 (BIA Sept. 17, 2010).

For noncitizens, the Board's choice of procedural mechanism for reopening proceedings does not matter. Rather, the important—often life-altering—aspect for noncitizens is that removal orders based on vacated convictions be stricken from existence such that they cannot continue to have legal effect.

CONCLUSION

Under a proper interpretation of the INA, convictions vacated by the states are not convictions for immigration purposes. The Board must accordingly grant motions to reopen proceedings where the removal order was based solely on a conviction that has since been vacated. The Board may do so either through equitable tolling of the statutory deadline or through exercising its regulatory *sua sponte* authority to reopen.

Respectfully Submitted,

April 27, 2022
Date

Tiffany J. Lieu
Philip L. Torrey
Rachel Landry, *Supervised Law Student*
Lydia Ghuman, *Supervised Law Student*
Crimmigration Clinic
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

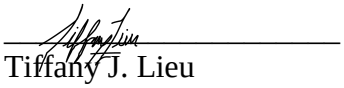
Andrew Wachtenheim
Nabilah Siddiquee
Immigrant Defense Project
P.O Box 1765
New York, NY 10027
Phone: 212- 725-6421

Counsel for Amici Curiae

PROOF OF SERVICE

On April 27, 2022, I, Tiffany Lieu, caused to be 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 to the following address:

Amicus Clerk
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041
703-605-1007



April 27, 2022
Date

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