No. 21-6380

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE RAMON PEGUERO VASQUEZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General,

Respondent.

On Petition For Review of an Order of the Board of Immigration Appeals
Agency No. A062-775-224

BRIEF OF IMMIGRANT DEFENSE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT AND FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E) STATEMENT

Immigrant Defense Project is a not-for-profit corporation. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

No party's counsel authored this brief in whole or in part.

No party's counsel or any other person contributed money to fund preparing or submitting this brief.

/s/*Andrew Wachtenheim*
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Dated: March 17, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

In recent years, several states have amended their sentencing laws both prospectively and retroactively to reduce sentencing maximums for all covered misdemeanors from one year in jail to 364 days or less. California and New York are two of these states. The laws lower the sentencing scheme for one hundred percent of misdemeanor defendants, past and future. The Board of Immigration Appeals ("BIA") asserted in a precedential opinion that federal immigration law will not (or does not) give effect to the retroactivity clause in the California law. *See Matter of Velasquez-Rios*, 27 I. & N. Dec. 470 (BIA 2018). Three years later, a single-member unpublished BIA opinion applied *Velasquez-Rios* to preempt the retroactivity clause in New York's law. *See* BIA Decision, Certified Administrative Record ("A.R.") at 5 (hereinafter "BIA Decision"). Both decisions must be struck down for unlawfully preempting state law without authorization by "constitutional text, federal statute, or treaty." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020); *see also Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) ("There is no federal preemption in vacuo[.]").

The Board's decisions in *Velasquez-Rios* and in Petitioner's case are contrary to statute, upset constitutional balance, and have significant human and systemic impact. *Amicus* Immigrant Defense Project ("IDP") respectfully submits this brief to assist this Court in identifying the unauthorized preemptive effect of

the Board's decisions. In Section I, *amicus* discusses how the Board violated the Immigration and Nationality Act ("INA") and the Supreme Court's jurisprudence by preempting the state sentencing laws without authority. In Section II, *amicus* discusses the presumption against preemption, the Board's failure to contend with or rebut the presumption, and the arbitrary, capricious, and otherwise unauthorized nature of the Board's. We respectfully urge this Court to vacate the Board's decision in Petitioner's case and overrule *Velasquez-Rios* to correct these grievous errors.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

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.

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. IDP has filed briefs on similar 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); *Matthews v. Barr*, 927 F.3d 606, 622-23 (2d Cir. 2019) (citing IDP brief); *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018).

ARGUMENT

I. THE BIA'S DECISIONS IN *VELASQUEZ-RIOS* AND IN PETITIONER'S CASE IMPERMISSIBLY PREEMPT STATE CRIMINAL LAWS AND MUST BE OVERTURNED

A. In Petitioner's Case, The BIA Preempted N.Y.P.L. § 70.15

In 2019, New York Penal Law § 70.15 was amended in to reduce the maximum sentence for all New York class A misdemeanors from 365 to 364 days. N.Y.P.L. § 70.15(1) ("A sentence of imprisonment for a class A misdemeanor . . . shall not exceed three hundred sixty-four days."). *See* Pet'r Br., 6. The sentencing reduction applies retroactively and prospectively to all misdemeanor convictions and sentences. N.Y.P.L. § 70.15(1-a)(a); N.Y.P.L. § 70.15(1-a)(b) ("The amendatory provisions . . . are ameliorative and shall apply to all persons who are sentenced *before, on or after* the effective date[.]" (emphasis added)).

Petitioner's case was decided in a nonprecedential BIA opinion interpreting the INA to preempt sections 70.15(1) and 70.15(1-a)(a)-(b): "[A]lthough section

70.15(1) may have retroactively modified the maximum possible sentence . . . for the purposes of State law, 'it does not affect the immigration consequences of his conviction under section 237(a)(2)(A)(i)(II)[1] of the Act, a *Federal* law.'" BIA Decision at 2-3 (quoting *Velasquez-Rios*, 27 I. &N. Dec. at 472) (emphasis in original). The decision relies almost entirely on *Velasquez-Rios*: "[I]n *Matter of Velasquez-Rios*, we held that section 237(a)(2)(A)(i)(II) of the Act 'calls for a backward-looking inquiry into the maximum possible sentence the [noncitizen] *could have received* for his offense *at the time of his conviction*." BIA Decision at 3 (quoting *Velasquez-Rios*, 27 I. & N. Dec. at 472) (emphasis in original). The Board explicitly "decline[d] to overturn or reconsider" *Velasquez-Rios*. BIA Decision at 3.

In *Velasquez-Rios*, the Board preempted California's misdemeanor sentencing law, California Penal Code § 18.5(a), which had retroactively lowered the maximum possible sentence that could have been imposed for a misdemeanor. The Board centered its decision on section 237(a)(2)(A)(i)(II) of the INA: "By its plain terms, that provision is concerned with whether" a noncitizen has been convicted of an offense "for which a sentence of 1 year of longer '*may be*

[1] The U.S. Code citation for INA § 237(a)(2)(A)(i)(II) is 8 U.S.C. § 1227(a)(2)(A)(i)(II). In this brief, *amicus* uses the INA citation for the sake of clarity for this Court because the Board uses the INA citation consistently throughout its opinion in *Velasquez-Rios*.

imposed.'" *Velasquez-Rios*, 27 I. & N. Dec. at 472 (quoting INA § 237(a)(2)(A)(i)(II)) (emphasis in original). The Board declined to give any effect to the explicitly retroactive state statute and instead held: "We therefore hold that the amendment to section 18.5 of the California Penal Code, which retroactively lowered the maximum possible sentence that could have been imposed for a[] [noncitizen]'s State offense from 365 days to 364 days, does not affect the applicability of section 237(a)(2)(A)(i)(II) of the Act[.]" *Id.* at 473.

"'[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). In the instant case and in *Velasquez-Rios*, such certainty is plainly absent, and the Board's preemptive decisions were unauthorized.

B. Legal Standard for Preemption

While Congress's power to preempt state laws under certain circumstances is rooted in the Supremacy Clause (U.S. Const. art. VI, cl. 2),[2] preemption doctrine is also rooted in the Tenth Amendment[3] and fundamental principles of federalism.

[2] The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding[.]" U.S. Const. art. VI, cl. 2.
[3] U.S. Const. amend. X, § 8 (providing that powers that are not specifically delegated to the federal government are reserved for the States).

Thus Congress's power to preempt state laws co-exists with—and is limited by—the fundamental federalism 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, 398 (2012).

Consistent with the principle that States are independent sovereigns in the federalist system, courts in preemption cases "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." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). A State's power to define criminal offenses and consequences for those offenses—including through sentencing laws—squarely falls within the historic police power. *See United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (describing regulation of crime as a prime example of state police power denied to the federal government and reposed in the States).

Congress may express intent to preempt a state law either explicitly or implicitly. First, Congress may explicitly state intent in an express preemption provision, which "expressly directs that state law be ousted to some degree from a certain field." *Association of Intern. Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602, 607

(2d Cir. 1996). Second, Congress may express intent to preempt through implied "field" preemption. "[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona*, 567 U.S. at 399. Third, state laws may be preempted through implied "conflict" preemption "when state law is in actual conflict with federal law." *Abrams*, 84 F.3d 602 (2d Cir. 1996) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)). Courts find implied conflict preemption when "compliance with both federal and state regulations is a physical impossibility" or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Arizona*, 567 U.S. at 399 (internal quotation marks and citation omitted).

C. The Board Was Not Authorized to Preempt N.Y.P.L. § 70.15

The Board's decisions in *Velasquez-Rios* and in Petitioner's case are fatally inconsistent with three dispositive preemption cases from the Supreme Court: *Kansas v. Garcia*, 140 S. Ct. 791 (2020), *Arizona v. United States*, 567 U.S. 387 (2012), and *Wyeth v. Levine*, 555 U.S. 555 (2009). In *Kansas* and *Wyeth*, the Court held preemption was unauthorized in the face of a federal statutory scheme. *See Kansas*, 140 S. Ct. at 804, 806 (finding no basis for express, field, or conflict preemption); *Wyeth*, 555 U.S. at 573 (rejecting claims of impossibility preemption and obstacle preemption as relying on "an untenable interpretation of

congressional intent and an overbroad view of an agency's power to pre-empt state law"). Notably, *Kansas* addressed the INA and a state criminal law regarding employment of noncitizens. *See Kansas*, 140 S. Ct. at 797. In *Arizona*, the Court found certain but not all provisions of a state law to be preempted by the INA. *See Arizona*, 567 U.S. at 416. The preempted state law provisions in *Arizona* have absolutely nothing to do with the type of state sentencing law in the present case. Collectively, all three cases clarify that there is no authority in the INA to preempt these state sentencing laws.

1. Express Preemption: The INA does not contain an express preemption clause regarding state sentencing laws and, even further, Congress deliberately structured the INA to defer to state law on sentencing

The INA's text does not allow for preemption of a state sentencing law for three primary reasons. First, there is no express preemption clause addressing state sentencing, though the INA contains other express preemption clauses. Second, the statutory text gives preemptive effective to a narrow sphere of state sentencing laws not at issue in the instant case. And third, overall the INA is structured to defer to and incorporate certain state criminal and family law determinations, including sentencing.

a. Absence of express preemption clause

The INA does not contain an express preemption clause relevant to state sentencing determinations. This is particularly prominent because the INA contains other express preemption clauses. For example, the INA "preempt[s] any State or local law imposing civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized" noncitizens. 8 U.S.C. § 1324a(h)(2).

In *Wyeth*, the Court found it highly significant that an express preemption clause existed as to one issue but was absent as to another. 555 U.S. at 574 ("despite . . . enactment of an express pre-emption provision for medical devices, Congress has not enacted such a provision for prescription drugs" (internal citation omitted)). The Court noted that if Congress thought that state laws "posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the [federal statute]'s 70-year history." *Id.* The Court concluded that Congress's silence, along with its awareness of state laws, was "powerful evidence that Congress did not intend" preemption. *Id.* at 575.

As in *Wyeth*, the absence of an express preemption clause here, despite the presence of other preemption clauses in the INA, signals that Congress did not intend to preempt state sentencing determinations in federal immigration proceedings. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)).

b. Statutory text

In the INA, Congress defined the words "term of imprisonment" and "sentence." 8 U.S.C. § 1101(a)(48)(B). The definition relies on state sentencing laws and decisions to determine what sentence is attached to a prior conviction. The only instance in which the definition appears to give any preemptive effect to state sentencing laws is the circumstance of a suspended state sentence, which the INA does not recognize. *See id.* Otherwise, the INA does not preempt state sentencing laws, and the Board was wrong to construe the INA to do so.

Prior to 1996, the INA did not contain a statutory definition of sentence. Instead, the definition and legal standards were established by the BIA and Attorneys General. In decision after decision, the agency held that immigration adjudicators are required to give full effect to state sentencing when determining immigration-related impact. *See, e.g.*, *Matter of J-*, 6 I. & N. Dec. 562, 566 (BIA 1956) (holding that a state parole board's commutation of a sentence should be deferred to for immigration purposes); *Matter of C-P-*, 8 I. & N. Dec. 504, 508 (BIA 1959) (holding that when a trial court alters or modifies a sentence, this should be given full effect for immigration purposes); *Matter of H-*, 9 I. & N. Dec.

380, 383 (BIA 1961) (holding that a state's vacatur of a sentence should be deferred to for immigration purposes); *Matter of Martin*, 18 I. & N. Dec. 226, 227 (BIA 1982) (holding that a state court sentence modification should be deferred to for immigration purposes).

In 1996, Congress codified 8 U.S.C. § 1101(a)(48)(B). In doing so, Congress used the same terms "sentence" and "term of imprisonment" that the BIA had used for decades in its precedential decisions on treatment of sentencing in proceedings under the INA. *Cf. Williams v. Taylor*, 529 U.S. 420, 434 (2000) ("When 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."). The *only* change to this common law history was the inclusion of suspended sentences within the definition. In 2005, the BIA decided *Matter of Cota-Vargas,* holding that a trial court's decision to modify a sentence *nunc pro tunc*, regardless of the reason, should be recognized as valid for purposes of immigration law. 23 I. & N. Dec. 849, 852 (BIA 2005). The BIA saw nothing within the language or purpose of the INA's sentence definition that indicated Congress's intent to preempt sentence modifications. *See id.* ("[W]e see nothing in the language or stated purpose of section 101(a)(48)(B) that would authorize us to equate a sentence that has been modified or vacated . . . with one that has merely been suspended"); *see also Matter of Song*, 23 I. & N. Dec. 173

(BIA 2001) (issued after promulgation of INA § 101(a)(48)(B) and giving effect to sentence modification under circumstances similar to *Cota-Vargas*).

In codifying the definitions of sentence and term of imprisonment under the INA, Congress unambiguously communicated its intent to continue to defer to state sentencing decisions, with a narrow exception for suspended sentences. The Board's contrary statutory interpretation is wrong, unauthorized, and must be reversed.

c. Statutory structure

The INA's structure further confirms Congress's intent to continue to defer to state sentencing determinations. *See Pereida v. Wilkinson*, 141 S. Ct. 754, 761 (2021) ("What the statute's text indicates, its context confirms."). Particularly where the interplay between federal immigration law and state criminal and child welfare laws are concerned, the INA defers to and incorporates state law determinations. This deliberate statutory structure supports reading the sentence definition to continue to respect state sentencing judgments. Three parts of the INA provide particularly useful examples.

First, as the federal courts have affirmed time and again, Congress wrote the INA to be "dependent on" prior state convictions and sentences. *Moncrieffe v. Holder*, 569 U.S. 184, 218 (2013) (Alito, J., dissenting). Immigration law relies on states to elucidate the elements of state criminal laws. *See Hylton v. Sessions*, 897

F.3d 57, 63–64 (2d Cir. 2018) (collecting cases). Immigration law further relies on state criminal court documents to prove the existence of a conviction. *See* 8 U.S.C. § 1229a(c)(3). The definition of "conviction" relies on a "formal judgment of guilt," 8 U.S.C. § 1101(a)(48)(A), and a "sentence" must have been ordered by a "court of law." *Id.* § 1101(a)(48)(B). As the Supreme Court has repeatedly recognized, in proceedings under the INA Congress chose to rely on state court adjudications rather than on a noncitizen's "conduct." *Mellouli v. Lynch*, 575 U.S. 798, 805 (2015).

Second, immigration law also relies on state court determinations to confer Special Immigrant Juvenile Status. *See* 8 U.S.C. § 1101(a)(27)(J)(i) (for immigration benefit to confer, young person must be "dependent on a juvenile court located in the United States"); *id.* § 1101(a)(27)(J)(ii) (for immigration benefit to confer, it must have been "determined in administrative or judicial proceedings that it would not be in the [young person's] best interest to be returned to" their "previous country"). Finally, state agency and court determinations of crime victim helpfulness are also binding on federal immigration U Nonimmigrant Status adjudications. *See* 8 U.S.C. § 1184(p)(1) (the petition "shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity").

For over half a century, significant portions of federal immigration law have operated to defer to the states on matters to which the states are closest, such as criminal sentencing. "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–167 (1989) (O'Connor, J., writing for a unanimous court) (internal quotation marks omitted). That is the case here, and the Board's decisions must be overturned.

2. Field Preemption: the INA does not field preempt N.Y.P.L. § 70.15 because state sentencing law is not a field that federal authorities occupy

The Supreme Court's decisions in *Kansas v. Garcia*, 140 S. Ct. 791 (2020), and *Arizona v. United States*, 567 U.S. 387 (2012), make clear that field preemption is not authorized in this case because the state laws are not "regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance." *Id.* at 399.

a. In every critical respect, N.Y.P.L. § 70.15 is similar to the Kansas law that the Supreme Court found is *not* preempted by the INA

The state of Kansas had passed a criminal law that attached penalties for "identity theft" and "fraud." *Kansas*, 140 S. Ct. at 797. The case before the Court involved three individuals prosecuted under that law. *Id.* (involving noncitizen defendants "who are not authorized to work" in the United States and were convicted under Kansas law for "fraudulently using another person's Social Security number on state and federal tax-withholding forms that they submitted when they obtained employment" at restaurants).

The three defendants challenged the law, citing to express and implied preemption theories and the INA's comprehensive regulation of employment, citizenship, and immigration status. The Court found that Kansas's criminal law operated in a different field from federal immigration law. *Id.* at 804 ("In order to determine whether Congress has implicitly ousted the States from regulating in a particular field, we must first identify the field in which this is said to have occurred."). The Court ultimately concluded, *inter alia*, "using another person's Social Security number on tax forms threatens harm that has *no connection with immigration law*." *Id.* at 805 (emphasis added). The same is true for the New York and California sentencing laws.

The New York and California laws are criminal laws squarely and exclusively within the States' police powers; they are not immigration laws. They are sentencing laws of universal application that have nothing to do with

immigration or citizenship status. *See supra* Section I.A. *See* N.Y.P.L. § 5.05 (the "provisions" "shall govern the construction and punishment of any offense defined in" this penal law); § 55.00 (New York's sentencing laws, by statute, "govern the classification and designation of every offense"); § 60.00 ("[t]he sentences prescribed by this article shall apply in the case of every offense").

Like the state criminal statute at issue in *Kansas*, the New York sentencing law in Petitioner's case occupies a field that is wholly separate from federal immigration law. Its preemption by the Board violates the INA and federal Constitution.

b. N.Y.P.L. § 70.15 is distinct from the laws that the Supreme Court found preempted in *Arizona v. U.S.*

In *Arizona*, the Supreme Court found three state law provisions preempted by the INA.[4] The Court's reasoning makes clear that N.Y.P.L. § 70.15 is not be preempted by the INA for three principal reasons.

First, one of the Arizona state law provisions concerned the "registration" of noncitizens, a category of state law with a long history of preemption by the INA. The Arizona law made criminal "the 'willful failure to complete or carry" a "registration document" as defined by federal immigration law. *Arizona*, 567 U.S.

[4] The Court found one provision would likely survive a preemption challenge. *Arizona*, 567 U.S. at 413-15. The Court's analysis of that provision does not significantly inform this case.

at 400 (quoting Ariz. Rev. Stat. Ann. § 13-1509(A)). The Court found the law preempted: "As it did in *Hines* [*v. Davidowitz*], the Court . . . conclude[d] that, with respect to the subject of [noncitizen] registration, Congress intended to preclude States from complementing the federal law, or enforcing additional or auxiliary regulations." *Arizona*, 567 U.S. at 403 (internal quotation and alterations omitted). N.Y.P.L. § 70.15 sits in an entirely different field from noncitizen registration laws. *Cf. Hines v. Davidowitz*, 312 U.S. 52, 61 (1941) (preempting a Pennsylvania law because its "basic subject" was "identical" to federal immigration law: "registration of [noncitizens] as a distinct group"). The New York law is not field preempted by the INA.

Second, one of the Arizona state law provisions created a new state crime for unauthorized work by noncitizens. *Arizona*, 567 U.S. at 403. The Court preempted the provision because, while historically the States were allowed more regulation over employment of noncitizens, modern federal law is "substantially different" since "Congress enacted [the Immigration Reform and Control Act] as a comprehensive framework" for employment of noncitizens. *Arizona*, 567 U.S. at 404. Congress has not enacted such a federal framework regarding state criminal sentencing. *See supra* Section I.C.1.

Finally, it is striking that one of the Court's apparent animating principles in preempting state laws is to protect against and prevent discrimination. *See Arizona*,

567 U.S. at 395; *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (invoking the Supremacy Clause against state law efforts to freeze desegregation orders by federal courts following *Brown v. Board of Education*). By contrast, the Board's preemption decisions in *Velasquez-Rios* and Petitioner's case choose a statutory interpretation that will be significantly discriminatory. The decisions will almost exclusively impact noncitizens who are Black, Latinx, and Southeast Asian, communities proven to face substantially higher impacts of state criminal system involvement and corresponding immigration consequences. *See* Alina Das, *No Justice in the Shadows: How America Criminalizes Immigrants* 83-85 (2020) (hereinafter "*No Justice*").

Congress wrote the immigration laws to prevent, not create, such discriminatory outcomes. *See* 8 U.S.C. § 1152(a)(1)(A) (prohibiting discrimination in issuance of lawful permanent resident status based on race, national origin, and other factors).

3. Conflict Preemption: the New York sentencing law does not conflict with federal immigration law

Conflict preemption is not authorized in this case, because there is no actual conflict between N.Y.P.L. § 70.15 and the INA. *See Association of Intern. Auto. Mfrs.*, 84 F.3d at 607 (implied conflict preemption occurs "when state law is in actual conflict with federal law"). The INA does not regulate in the area of state

sentencing laws, and state sentencing laws do not regulate federal immigration law. Accordingly, there is no impediment to compliance with both the state sentencing laws and the INA; nor is the state sentencing law "an obstacle to the accomplishment and execution" of the INA. *See Arizona*, 567 U.S. at 399 (explaining that conflict preemption is found when "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

This case is on all fours with the Supreme Court's reasoning in *Wyeth v. Levine*, which held a Vermont law was not preempted by the statutes and regulations administered by the federal Food and Drug Administration. 555 U.S. at 558. As in *Wyeth*, the Board in Petitioner's case and *Velasquez Rios* did not include "any discussion of how state law has interfered with" the federal scheme "during decades of coexistence." *Id.* at 577. As in *Wyeth*, the present case involves the "historic police powers of the States," which courts presume are not preempted by federal law absent a clear indication from Congress. *Id.* at 565 (internal quotations omitted); *see also Kansas*, 140 S. Ct. at 806 (For centuries, "criminal law enforcement has been primarily a responsibility of the States, and that remains true today."). The mere presence of federal regulation in the field is insufficient to overcome the presumption. *See Wyeth*, 555 U.S. at 565 n.3 ("The presumption"

against preemption "thus accounts for the historic presence of state law but does not rely on the absence of federal regulation.").

In the absence of actual conflict between the state and federal laws, the Board was not permitted to preempt the state sentencing laws in *Velasquez-Rios* and Petitioner's case. The Board's decisions ignore and betray the Supreme Court precedent, "which enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960). "[T]he possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption." *Kansas*, 140 S. Ct. at 807.

II. THE PRESUMPTION AGAINST PREEMPTION APPLIES HERE AND CONFIRMS THAT THE BOARD'S INTERPRETATION OF THE INA IN *VELASQUEZ-RIOS* AND ITS APPLICATION TO N.Y.P.L. § 70.15 IS ERRONEOUS AND FAILS AT ANY STAGE OF THE *CHEVRON* FRAMEWORK— STEP ZERO, ONE, OR TWO

A. The Board's Decision In *Velasquez-Rios* And Its Application To N.Y.P.L. § 70.15 Violate The Presumption Against Preemption And Are Contrary To Statute And The Constitution

It is presumed that state laws that fall within States' residual police powers are not preempted by federal law without a clear direction from Congress. *See Wyeth*, 555 U.S. at 565. On this issue, this case is open and shut. Congress did not write the INA to preempt state sentencing laws. The presumption against

preemption remains unrebutted, and the Board was not authorized to preempt N.Y.P.L. § 70.15.

As the Supreme Court explained in *Wyeth*, the presumption against preemption is a "cornerstone" of preemption jurisprudence, and "[i]n all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 555 U.S. at 565 (internal quotation marks omitted). *Wyeth* further clarified that the presumption applies in all preemption cases, including implied conflict preemption cases. *Id.* at 565 n.3; *see also New York SMSA Ltd. v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) ("Traditionally, there has been a presumption against preemption with respect to areas where states have historically exercised their police powers.").

In this case, the presumption against preemption has not been rebutted. As discussed above, the INA's text, context, and structure establish that it does not preempt state sentencing laws: there is no express preemption provision, the INA text does not suggest preemption in this circumstance, and decades of agency and federal court decisions recognize that Congress drafted the INA to defer to state law on criminal sentencing, rather than preempt it. *See supra* Section I.C.1. The Supreme Court's precedent on preemption and statutory interpretation command this reading of the statute. *See supra* Sections I.C.2., I.C.3. *See also Chevron*

U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (stating that courts "must reject administrative constructions which are contrary to clear congressional intent[.]").

Should this Court review the Board's decision within the *Chevron* framework,[5] the presumption against preemption is a traditional tool of statutory construction that should be employed prior to considering deference to the Board. When reviewing agency interpretation of a federal statute, courts first consider plain meaning and statutory context and, if necessary to ascertain Congress's intent, employ traditional tools of statutory construction prior to considering deference to the agency. *See 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."); *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012) (stating that courts proceed to step two only "if . . . the statute remains ambiguous despite our use of all relevant tools of statutory construction and legislative history"). *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 319 n.45 (2001) (presumption against retroactivity); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73

[5] Amicus IDP strongly agrees with Petitioner that the deference framework of *Chevron* is not applicable in this case because the INA statutory provisions at issue are dual application in both federal criminal prosecutions and civil immigration proceedings. *See* Pet'r Br., 27-29.

(2001) (constitutional avoidance canon and presumption against preemption); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574–75 (1988) (constitutional avoidance canon).

In this case, the presumption against preemption is a traditional tool of statutory construction that assists in resolving the statutory interpretation question. It yields the conclusion that the Board's decision preempting New York's sentencing law is contrary to congressional intent and must be overturned.

B. The Board's decisions in *Velasquez-Rios* and Petitioner's case are unreasonable, arbitrary and capricious, and contrary to law.

Should this Court find that the *Chevron* framework applies and that the relevant INA provisions are ambiguous despite application of statutory construction principles, the BIA decisions in this case are impermissible at *Chevron* step two because they are arbitrary and capricious[6], contrary to the INA[7], and violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A)[8]. They are preemptive without statutory or other authority and therefore must be

[6] *See Chevron*, 467 U.S. at 843 (stating that regulations that are "arbitrary, capricious, or manifestly contrary to the statute" are not given controlling weight)
[7] *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (internal quotation marks and citation omitted) ("[U]nder *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance.").
[8] Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

reversed for five principal reasons. *See Singh v. Gonzales*, 468 F.3d 135, 139 (2d Cir. 2006) ("Where the BIA's interpretation is arbitrary, capricious, or manifestly contrary to the statute, it merits no deference." (internal quotation marks omitted)).

First, the statutory language, context, and structure of the INA all confirm that the statute was not written to preempt state sentencing laws in this fashion. *See supra* Section I.C.1. The Supreme Court's preemption cases make clear this is the correct statutory interpretation. *See supra* Sections I.C.1, I.C.2. Moreover, the Board's failure to even consider the presumption against preemption was itself error.

Second, the Board departed from and mischaracterized its prior agency precedent. In *Velasquez-Rios*, the Board relied on *Matter of Cortez*, 25 I. & N. Dec. 301 (BIA 2010), as holding that the CIMT deportability clause, INA § 237(a)(2)(A)(i)(II), calls for a backward-looking inquiry to the sentence at the time of conviction. But in *Cortez*, the Board decided a completely different question: whether the CIMT deportability clause applies in the context of eligibility for cancellation of removal. *See Cortez*, 25 I. & N. Dec. at 311. The Board also relied on and construed *Matter of Esfandiary*, 16 I. & N. Dec. 659 (BIA 1979) as a holding "consistent with the long-standing practice" of considering the conviction and sentence at the time of conviction. *Velasquez-Rios*, 27 I. & N. Dec. at 473 n.7. However, *Esfandiary* addressed a different matter: there, a noncitizen's sentence

was modified, and the Immigration and Naturalization Service—no longer able to rely on that conviction to support the removability charge—introduced a second conviction to establish a new removability charge. 16 I. & N. Dec. at 660.

Third, the Board's chosen interpretation is unreasonable because it raises significant constitutional concerns. It will almost one hundred percent be applied against immigrants who are Black, Latinx, and people of color. *See supra* Das, *No Justice* at 83-85. Moreover, the Board issued *Velasquez-Rios* when Donald J. Trump and Jefferson B. Sessions, III were President and Attorney General of the United States, respectively. Both displayed racial animus toward immigrants from majority-Latinx and majority-Black countries.[9] The Fifth Amendment's Due

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[9] *See* Adam Serwer, *Jeff Sessions's Unqualified Praise for a 1924 Immigration Law*, Atlantic, Jan. 10, 2017, https://bit.ly/3azWoiJ (quoting then-Attorney General Sessions: "In seven years we'll have the highest percentage of Americans, nonnative born, since the founding of the Republic. . . . When the numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly[.]"). The "1924 law" to which then-Attorney General Sessions was referring "had instituted a system of ethnic quotas so stringent that large-scale immigration was choked off for decades . . . [i]n order to keep America white, Anglo-Saxon, and Protestant." Jia Lynn Yang, *One Mighty and Irresistible Tide: The Epic Struggle Over American Immigration, 1924-1965* 2 (2020). *See also* Sam Stein & Amanda Terkel, *Donald Trump's Attorney General Nominee Wrote Off Nearly All Immigrants From an Entire Country*, Huffington Post, Nov. 19, 2016, https://bit.ly/3cBQuQH (quoting then-Attorney General Sessions' 2006 speech on the U.S. Senate Floor: "almost no one coming from the Dominican Republic to the United States is coming here because they have a provable skill that would benefit us and that would indicate their likely success in our society"); Josh Dawsey, *Trump derides protections for immigrants from 'shithole' countries*, Wash. Post, Jan. 12, 2018, https://wapo.st/3cEhora (former President Trump describing Haiti, El

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)). It "would be unacceptable to allow the federal government to discriminate based on race" by choosing to interpret a putatively ambiguous statute in a discriminatory manner. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 669 (3rd ed. 2006). *See Jones v. United States,* 529 U.S. 848, 857 (2000) ("where a statute is susceptible of two constructions" and one gives rise to "grave and doubtful constitutional questions . . . and by the other . . . such questions are avoided," the "duty is to adopt the latter" (internal citations and quotation marks omitted)).

Fourth, defense counsel, judges, and prosecutors in state and federal courts hold constitutional and statutory duties with respect to noncitizen defendants to criminal charges. *See, e.g.*, *Padilla*, 559 U.S. at 373-74; *People v. Peque, et al.*, 22 N.Y.3d 168, 190 (2013); *Matter of Adamiak*, 23 I. & N. Dec. 378 (BIA 2006). Court system stakeholders rely on state laws to be properly interpreted so they can appropriately and competently handle state court matters, and advise their

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Salvador and African countries as "shithole countries" and asking, "Why are we having all these people from shithole countries come here?").

clients, witnesses, and people appearing before them.[10] By preempting state sentencing laws without statutory or constitutional authority, the Board has frustrated the cardinal rule that law must be comprehensible and interpreted through "well-established" and "plain, common-sense rules" of statutory interpretation. Frederick Douglass, *Oration, Delivered in Corinthian Hall, Rochester* (Ed. Lee, Mann & Co., American Building 1852).

Finally, in *Velasquez-Rios* and Petitioner's case, the Board did not "offer[] States or other interested parties notice or opportunity for comment." *Wyeth*, 555 U.S. at 577. The Board issued no *amicus curiae* invitations, despite having issued such invitations in at least ten other cases the year it decided *Velasquez-Rios*, most of them ending with published, precedential opinions.[11] One of those *amicus* invitations involved a California post-conviction relief measure, but the Board published no opinion in that case.[12] In the following year's *amicus* invitations, the Attorney General solicited briefs on state resentencing decisions in immigration

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[10] *See, e.g.*, Brief of Fair and Just Prosecutions submitted in *Matter of Thomas and Thompson*, *available at* https://fairandjustprosecution.org/wp-content/uploads/2019/08/Immigration-Amicus-Brief_Aug-2019.pdf (last visited Mar. 8, 2022).

[11] *See* U.S. Department of Justice, Agency Invitations to File Amicus Briefs, *available at* https://www.justice.gov/eoir/amicus-briefs (last visited Mar. 8, 2022).

[12] *See* Amicus Invitation No. 18-06-27 (Amended), Validity of a Conviction for Immigration Purposes, *available at* https://www.justice.gov/eoir/page/file/1074676/download (last visited Mar. 15, 2022).

cases.[13] Prosecutors and attorneys general representing millions of people across the United States, as well as legal organizations of thousands of immigration and criminal law experts filed briefs with the Attorney General arguing vociferously that the INA is written to recognize state sentencing decisions.[14] The BIA did not solicit or receive any of this input in either *Velasquez-Rios* or this case.

CONCLUSION

"Throughout our history the several States have exercised their police powers to protect the" public "health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474 (1996). The Board has impermissibly intruded on this authority by preempting New York's misdemeanor sentencing law. This Court must reverse the agency's unlawful and damaging action.

Respectfully submitted,

Dated: March 17, 2022

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[13] *See* Attorney General Amicus Invitation *Matter of Thomas and Thompson*, *available at* https://www.justice.gov/eoir/page/file/1166251/download (last visited Mar. 8, 2022).
[14] *See, e.g.*, *See* Brief of Fair and Just Prosecutions submitted in *Matter of Thomas and Thompson*, *available at* https://fairandjustprosecution.org/wp-content/uploads/2019/08/Immigration-Amicus-Brief_Aug-2019.pdf (last visited Mar. 8, 2022).

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Second Circuit Rule 32, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,457 words.

Date: March 17, 2022 /s/ Andrew Wachtenheim

CERTIFICATE OF SERVICE

I, Andrew Wachtenehim, hereby certify that on March 17, 2022, I electronically filed the foregoing *Amicus Curiae* Brief with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by email, pursuant to the instructions of the Clerk's office.

I certify that all participants in the case are registered ACMS and CM/ECF users and that service will be accomplished by the ACMS or CM/ECF system upon the following individuals:

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