IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2509/21-3268

Agency No. 214-938-867

ANDREA PAOL PACHECO VEGA,
Petitioner

v.

U.S. ATTORNEY GENERAL,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

BRIEF OF *AMICI CURIAE* HARVARD LAW SCHOOL CRIMMIGRATION CLINIC IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Philip L. Torrey as counsel for *amici curiae*, states that the Harvard Law School Crimmigration Clinic and the Immigrant Defense Project do not have parent corporations, nor do they issue stock, and thus no publicly held corporation owns 10% or more of the organizations' stock.

DATED: March 21, 2022

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STATEMENT OF INTEREST

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 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.

The Immigrant Defense Project ("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 submitted *amicus curiae* briefs in many key cases before the U.S. Supreme Court and Courts of Appeals involving the interplay between criminal and immigration law and the rights of immigrants in the criminal legal and immigration systems. *E.g.*, *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief); *Orabi v. Att'y Gen.*, 738 F.3d 535 (3d Cir. 2014).

STATEMENT IN COMPLIANCE WITH RULE 29 (E)

This brief is proffered pursuant to Federal Rule of Appellate Procedure 29. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *Amici Curiae*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

For over sixty years the Board of Immigration Appeals ("BIA") and federal courts acknowledged that a state court sentence modification must be given full legal effect in immigration proceedings regardless of the reason for the underlying modification.[1] In 2019, Attorney General ("AG") Barr upended these long-standing precedents in a decision holding that only certain sentence modifications will be recognized in immigration proceedings. *See Matter of Thomas and Matter of Thompson*, 27 I. & N. Dec. 674 (AG 2019) ("*Thomas/Thompson*") (holding that only state court sentences that have been modified for a putative "procedural or substantive defect in the underlying criminal proceeding" will be given full legal effect under immigration law).

Not only does *Thomas/Thompson* contravene decades of BIA precedent, but it is also untethered from the unambiguous text of the Immigration and Nationality Act 1952 ("INA"). *See* Pub. L. No. 104-208, § 322, 110 Stat. 3009 (1996). The statute's plain language, context, and structure yield the incontrovertible conclusion that Congress intended immigration adjudicators to recognize sentencing modifications regardless of the sentencing court's motivation. Moreover, *Thomas/Thompson* upsets constitutional balance by overriding the states' constitutionally provided police powers over their criminal laws and by

[1] Both parties have consented to the timely filing of this amicus brief.

preempting state laws and court orders without the required authority for doing so. Furthermore, the sentence definition is a statute of dual application with implications for both immigration law and federal criminal law. Ambiguities in such statutes are not resolved under the framework of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as deference to agency interpretations of dual application statutes is not proper and would disrupt the federal separation of powers.

By failing to apply these and other dispositive statutory interpretation principles, the AG Barr arrived at an interpretation of law that Congress did not intend or authorize. The AG's decision in *Thomas/Thompson* represents an impermissible interpretation of the sentence definition and should therefore be rejected by this Court.

ARGUMENT

I. BY CREATING A HEIGHTENED AND EXTRA-STATUTORY STANDARD FOR HOW FEDERAL IMMIGRATION LAW TREATS STATE RESENTENCING DECISIONS, *THOMAS/THOMPSON* VIOLATES THE INA'S STATUTORY DEFINITION OF SENTENCE AND CONTRAVENES DECADES OF AGENCY CASE LAW REPEATEDLY RECOGNIZING SENTENCE MODIFICATIONS FOR IMMIGRATION PURPOSES.

For more than sixty years, the BIA held that a state court's sentence modification must be given effect in immigration proceedings. Such recognition comports with the principles of federalism upon which the United States' system

of dual sovereignty is founded. Dual sovereignty requires that a state's ability to enact and enforce its criminal laws and procedures cannot be impeded by the federal government absent a clear statement of intent by Congress.

In 1996, the Illegal Immigration Reform and Responsibility Act ("IIRIRA") introduced the first statutory definitions of the terms conviction and sentence to the INA. The text of the sentence definition incorporates the prior decades' of decisional law nearly verbatim, with one narrow and explicit exception: it expands the sentence definition to include circumstances where there has been "suspension of the imposition or execution of sentence." 8 U.S.C. § 1101(a)(48)(B). That is the only statutory departure from the historical treatment of resentencing in immigration cases.

Notably, nowhere in the sentence definition does the text indicate that Congress meant to change how courts view sentencing modifications. Had Congress intended to further expand the sentence definition to exclude resentencing measures or modifications from consideration in immigration proceedings, Congress would have done so. *Cf. Orabi v. Att'y Gen.*, 738 F.3d 535, 541 (3d Cir. 2014). "The fact that [Congress] did not adopt [a] readily available and apparent alternative strongly supports" this conclusion. *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018)

(brackets in original and internal citation omitted)).

Continued deference to sentencing court determinations is otherwise consistent with the structure of the INA. *Pereida v. Wilkinson*, 141 S. Ct. 754, 761 (2021) ("What the statute's text indicates, its context confirms."). In several places in the INA, the statute is structured to defer to state law determinations. For example, as the federal courts have affirmed time and again, Congress wrote the INA to be "dependent on" prior state convictions and sentences, and on the States to define the contours of their convictions and sentences. *See Moncrieffe v. Holder*, 569 U.S. 184, 218 (2013) (Alito, J., dissenting); *cf. Hylton v. Sessions*, 897 F.3d 57, 63–64 (2d Cir. 2018) (collecting cases). Immigration law also relies on state court determinations to confer Special Immigrant Juvenile Status. *See* 8 U.S.C. § 1101(a)(27)(J)(i)–(ii). State agency and court determinations of crime victim helpfulness are also binding on federal immigration U-nonimmigrant status adjudications. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(III).

Congress wrote the sentence definition within this context of according deference to state law determinations on issues to which the states are closest: issues of criminal and family law, and child welfare. Yet, the AG's decision in *Thomas/Thompson* directs immigration adjudicators to ignore a state court's sentence modification unless modification has been pursued due to a putative "procedural or substantive defect in the underlying criminal proceeding." 27 I. & N. Dec. 674, 690 (AG 2019).

Nowhere in the INA has Congress authorized the AG to restrict the recognition of sentence modifications in immigration proceedings. To do so in these circumstances would disrupt foundational principles of federalism and conflict with decades of agency precedent and the text as written by Congress.

A. Prior to the IIRIRA, Well-Established Case Law Required Immigration Adjudicators to Give Full Effect to Post-Conviction Sentence Modifications.

Prior to the IIRIRA, federal law did not statutorily define the term "sentence." Instead, a well-developed body of case law established when post-conviction sentencing modifications were to be recognized for immigration purposes. Although the jurisprudence changed slightly over time, immigration adjudicators were required to give full effect to sentence modifications when determining their immigration-related impact. *See, e.g.*, *Matter of J-*, 6 I. & N. Dec. 562, 566 (BIA 1955) (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 court'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).

For example, in *Matter of J-* the BIA held that a subsequently commuted sentence should be given full effect for immigration purposes. 6 I. & N. Dec. 562, 567 (BIA 1955). In that case, a lawful permanent resident was initially sentenced, by a state court, to at least one year and no more than ten years in prison for a fraud offense. *See id.* at 562–3. But, ten months after sentencing, the sentence was commuted by the state court. *Id.* The BIA held, consistent with their jurisprudence, that the original sentence lost all legal efficacy and that the commuted sentence should be given full legal effect. *See id.* at 563–7.

Similarly, in *Matter of H-*, the BIA gave full legal effect to a state court's vacatur of a prior sentence. 9 I. & N. Dec. 380, 384 (BIA 1961). In that case, a non-citizen was initially sentenced to at least eighteen months and no more than fifteen years in prison for an offense that qualified as a crime involving moral turpitude. *See id.* at 380–81. But, less than a year after sentencing, the non-citizen was removed from custody and a new trial was granted by the state court that resulted in a ten-month term of probation. *Id*. During the individual's removal proceedings, the government argued that the BIA should only give effect to the initial sentence. *See id.* at 381–2. The BIA rejected that argument because it contradicted the BIA's own precedent. *See id.* at 382–4.

Finally, in *Matter of Martin*, the BIA likewise deferred to a state court's sentence modification. 18 I. & N. Dec. 226, 228 (BIA 1982). In that case, a lawful

permanent resident was sentenced to a twelve-year term of imprisonment for an offense that qualified as a crime involving moral turpitude. *See id.* at 227. After subsequently moving the criminal court for reconsideration, the respondent's sentence was modified to three months' time served and a five-year probation. *Id.* The state law at issue in the case authorized state courts to modify a sentence at any time in light of relevant and material factors not considered in the initial sentencing. *Id.* The BIA subsequently gave full effect to the respondent's modified sentence in her removal proceedings. *See id.* at 227–28.

This consistent deference to state court sentencing modifications created a uniform standard for immigration judges to apply. Judges simply accepted and recognized sentence modifications without dissecting complicated state-specific criminal procedures and attempting to ascertain the underlying purpose of a modification. Against this historical backdrop, Congress provided the first statutory definitions of "conviction" and "sentence" when it passed IIRIRA.

B. For Over a Decade Prior to *Thomas/Thompson*, The Board Appropriately Recognized That IIRIRA Did Not Alter These Well-Established Precedents Except in Cases of "Suspended" Sentences.

When codifying the sentence definition, Congress chose not to abrogate the decades of BIA precedent related to sentence modifications. *See* 8 U.S.C. § 1101(a)(48)(B) (statutory definition of sentence); *see also* H.R. CONF. REP. NO. 104-828, at 224 (1996) (Conf. Rep.).

Interpreting IIRIRA's new sentence definition. The BIA itself concluded that its pre-IIRIRA precedent recognizing state sentence modifications remained undisturbed by the new statutory provision. *Matter of Song*, 23 I. & N. Dec. 173, 174 (BIA 2001) (reaffirming *Matter of Martin*, 18 I. & N. Dec. 226, 227 (BIA 1982)) (distinguishing *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999)).

In *Matter of Song*, the BIA held that the INA requires courts to give full legal effect to a state court's vacatur of a prior sentence. 23 I. & N. Dec. 173, 174 (BIA 2001). In that case, a non-citizen was sentenced to one year in prison for a theft offense that qualified as an aggravated felony. *Id.* The non-citizen's sentence was later revised *nunc pro tunc* to a 360-day suspended sentence. *See id.* at 173–4. Citing *Matter of Martin*, the BIA noted that its precedent had previously given full legal effect to sentence modifications. *Id.* The BIA also distinguished its post-IIRIRA conviction definition jurisprudence, which it considered irrelevant to determining whether to give full legal effect to a sentence modification. *Id.* (citing *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

In *Matter of Cota-Vargas,* the BIA held that a trial court's decision to modify a respondent's criminal sentence *nunc pro tunc*, regardless of the reason for the decision, should be recognized as valid for the 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. *Id.* Citing *Matter of Song*, the BIA held that immigration law continues to defer to the prior state's court decision to reduce the non-citizen's sentence to be under 365 days. *Id.*

Similar to its rationale in *Matter of Song*, the BIA also reaffirmed that there was no basis in IIRIRA to apply the *Pickering* rationale to *sentence* modifications. *See Matter of Cota-Vargas*, 23 I. & N. Dec. at 852. In *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003), the BIA held that state vacaturs of *convictions* were only valid for immigration purposes if the vacatur was based on a supposed "procedural or substantive defect in the underlying proceedings." *Id.*; *see also Pinho v. Gonzales*, 432 F.3d 193, 199 (3d Cir. 2005). Circuit Courts similarly rejected the *Pickering* rationale when interpreting sentence modifications. *See, e.g., Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 846 (9th Cir. 2003), *overruled on other grounds by Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014) (reasoning that there is a well-settled principle that a state court's sentence modification is "qualitatively different" from a state court's expungement of a conviction) Rumierz *v. Gonzales*, 456 F.3d 31, 41 n.11 (1st Cir. 2006) (affirming *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 846 (9th Cir. 2003), *overruled in part by Ceron v. Holder*, 747 F.3d at 778) (internal quotation marks omitted).

This longstanding precedent was consistently followed by the BIA until 2019 when AG Barr issued *Thomas/Thompson* and erroneously applied *Pickering*'s holding regarding convictions to sentence modifications.

C. *Thomas/Thompson* Abruptly Departed from These Decades of Precedent Where Federal Immigration Law Defers to States Court Sentence Modifications.

The AG abruptly changed course in *Thomas/Thompson*. In the name of "uniformity," the AG erased well-developed precedent for when a state court's sentence modification should be given full effect for immigration purposes. *See Thomas/Thompson*, 27 I. & N. Dec. at 683. Despite his proclamation, the AG's decision in *Thomas/Thompson* does not promote the uniform application of the sentence definition and in fact leads to greater disparity. Prior to the *Thomas/Thompson* sentencing standard there *was* uniformity in the immigration courts' treatment of state sentence modifications. Adjudicators simply deferred to a state court's sentence modification.

Under *Thomas/Thompson*, treatment of a state sentence modification now varies greatly depending on state-specific resentencing procedures and the varied types of documents that may be included in a criminal record. *See* Richard Frankel, "*Deporting* Chevron*: Why the Attorney General's Immigration Decisions Should Not Receive* Chevron *Deference*, 54 U.C. Davis L. Rev. 547, 605 (2020) (noting that *Thomas/Thompson* rejected well-developed BIA decisional law and that the

AG's decision does not increase or promote consistency). Adjudicators must now sift through court records and comb through varied state procedures to decipher the rationale behind a state court's sentence modification and then whether it qualifies as a "substantive" or "procedural" defect.

Amici accordingly urge this Court to vacate the AG's decision in *Thomas/Thompson*.

II. PROPER APPLICATION OF CONSTITUTIONAL AND STATUTORY INTERPRETATION PRINCIPLES DEMONSTRATE THAT THE SENTENCE DEFINITION UNAMBIGUOUSLY REQUIRES DEFERENCE TO SENTENCE MODIFICATIONS.

Not only does *Thomas/Thompson* represent an abrupt departure from decades of decisional BIA precedent and create inconsistencies in the adjudication of sentence modifications, but it is also contrary to core principles of federalism and congressional intent reflected in the plain text of the statute. Nowhere in the IIRIRA's sentence definition did Congress explicitly authorize immigration adjudicators to disregard certain criminal sentence modifications while giving full effect to others. To be clear, Congress could have easily done so when it crafted the sentence definition to include suspended sentences. But it refrained from even mentioning sentence modifications in the statute and instead clearly intended to leave the decades of well-developed case concerning sentence modifications.

When interpreting a statute, courts employ tools of statutory interpretation to identify statutory meaning. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562,

1569 (2017). Here, the canons of statutory interpretation, including the clear statement rule, the presumption-against-federal-preemption canon, and the prior construction canon are dispositive. They demonstrate that the INA unambiguously gives full legal effect to sentence modifications. To the extent this Court is unpersuaded that the statute's text is clear, the rule of lenity applies to resolve any ambiguity in the noncitizen's favor.

A. The Presumption Against Federal Preemption: in the INA Congress Did Not Intend to Preempt State Sentencing Laws or Otherwise Infringe on the States' Police Powers to Regulate Criminal Sentencing.

The AG's decision is contrary to the presumption against federal preemption. The Supreme Court determined that it is appropriate to refer to basic principles of federalism, as embodied in the Constitution, when Congress does not expressly state its intent to intrude on the states' regulatory powers. *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) (holding that unless there is a clear indication that Congress intended to regulate local criminal activity, such regulation should be left to the states); *see also Sikkelee v. Precision Automotive Corp.*, 822 F.3d 680, 683 (3rd Cir. 2016) ("Congress must express its clear and manifest intent to preempt an entire field of state law.").

Pursuant to federalism principles, it is the states—not the federal government—that have authority to administer their criminal laws. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (In "our federal system, the States

possess primary authority for defining and enforcing the criminal law."). States' police powers must not be disturbed absent an "unmistakably clear" statement of intent from Congress. *Gregory v. Ashcroft*, 501 U.S. 452, 476 (1991). A court must therefore presume that any agency interpretation of a statute does not encroach on federalism principles absent a clear statement from Congress to the contrary. *See Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543 (2002) ("When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotations omitted)).

This clear statement rule is dispositive here. The INA's sentence definition contains no language whatsoever indicating that Congress intended to undermine state resentencing determinations except in cases of suspended sentences. If Congress meant to preclude state sentence modifications from the sentence definition it could have easily done so. According to the BIA, there is "nothing in the language or stated purpose of [the sentence definition] that would authorize us to equate a sentence that has been modified or vacated by a court ab initio with one that has merely been suspended." *Matter of Cota-Vargas*, 23 I. & N. at 852. Indeed, Congress deliberately decided to alter the federal-state balance *only* as it relates to suspended sentences and not regarding other state sentencing decisions, including sentence modifications.

AG Barr's claim in *Thomas/Thompson* that certain sentence modifications should be disregarded because "Congress' intent to attach immigration consequences to certain convictions and sentences" in this context is wholly insufficient to sanction preemption of state sentencing laws. 27 I. & N. Dec. at 675. The Supreme Court has already held that "the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption." *Kansas v. Garcia*, 140 S. Ct. 791, 807 (2020). Otherwise, "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'" remains unrebutted and the state law regime must stand. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Under the Supreme Court's jurisprudence, this case is open and shut. This is a paradigmatic example where "Congress has indicated its awareness of the operation of state law" as it interrelates with federal immigration law—"a field of federal interest"—"and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth v. Levine*, 555 U.S. 555, 575 (2009) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–167 (1989) (internal quotation marks omitted)). This court should therefore reject the *Thomas/Thompson* decision as an unauthorized interpretation of the INA, and restore the state of the law to what it had been prior to AG Barr's intervention.

B. The Prior Construction Canon: in Legislating a Statutory Definition of Sentence, Congress Incorporated Decades of Decisional Law Giving Full Effect to Sentence Modifications in Immigration Proceedings, Which *Thomas/Thompson* Impermissibly Contravenes.

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

In *Williams v. Taylor*, the Supreme Court sought to interpret the meaning of "failed to develop" under 28 U.S.C. § 2254(e)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to determine whether the statute bars an evidentiary hearing where the petitioner did not develop the factual basis of her claims in state court proceedings despite diligent efforts. *See* 529 U.S. 420, 430 (2000). In holding that it does not, the Court emphasized that the language of § 2254(e)(2) "echoes" that in a prior case, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992). In *Keeney*, the Court noted a prisoner's "failure to develop a material fact in state court" and held that the prisoner was required to meet a heightened standard of prejudice before receiving a hearing on his claim. 504 U.S. 1, 8 (1992);

id. at 3. Applying the prior-construction canon, the Court in *Williams v. Taylor* concluded that, because § 2254(e)(2) mirrored the language of *Keeney*, "Congress intended to preserve at least" that aspect of *Keeney*'s holding. *See* 529 U.S. at 433.

This Court also has applied the prior-construction canon with respect to the conviction finality rule. *See Orabi*, 738 F.3d at 54. In that case, this Court held that in codifying a statutory definition of "conviction" in the INA, Congress incorporated the pre-IIRIRA history of decisional law that excluded convictions pending appeal from the immigration definition of conviction. *See id.*

The BIA has similarly applied the prior-construction canon in the sentence definition context in two precedential cases since the IIRIRA. In those cases, the BIA gave state court criminal sentence modifications full legal effect without regard to the underlying purposes of the modification. *See e.g., Matter of Cota-Vargas*, 23 I. & N. Dec. at 852–53 (giving "full faith and credit" to a California Superior Court decision modifying a respondent's sentence *nunc pro tunc* from 365 days to 240 days); *Matter of Song*, 23 I. & N. Dec. at 174 (deferring to the Circuit Court for Montgomery County, Maryland's sentence reduction from 365 days to 360 days).

As discussed *supra*, Section I.B., those BIA decisions recognized that while Congress intended to change how suspended sentences were interpreted in

immigration proceedings, it did not mean to upend case law recognizing state sentence modifications in immigration proceedings.

Congress crafted the sentence definition against that backdrop and deliberately chose not to undo the decades of jurisprudence recognizing sentence modifications. This Court should therefore reject *Thomas/Thompson* because it does not accord with the prior construction canon and is an abrupt and unreasoned departure from longstanding BIA jurisprudence.

C. Should the Court Find Any Remaining Ambiguities after Applying These Linguistic and Interpretive Principles, the Court Should Apply the Rule of Lenity to Resolve Any Ambiguities in Favor of Noncitizens Like the Petitioner.

Should this Court conclude that the statute is ambiguous, it must resolve any ambiguity in the noncitizen's favor under the rule of lenity and the presumption against deportation. *See e.g., United States v. Shabani*, 513 U.S. 10, 17 (1994) (reasoning that the rule of lenity must apply when all other traditional canons of statutory interpretation have failed to render an ambiguous statute unambiguous).

The rule of lenity is based on the principle that defendants are entitled to notice of the consequences of criminal conduct. *United States v. Bass*, 404 U.S. 336, 347–8 (1971). When those consequences are particularly severe, the legislature must have spoken clearly to the issue. *Id.* Judge Bibas' concurring opinion in *United States v. Nasir* is further illustrative. 982 F.3d 144, 177–79 (3d Cir. 2020), *judgment vacated and remanded* 142 S.Ct. 56 (2021). In that opinion,

Judge Bibas reasoned that applying the rule of lenity ensures accordance with other "core values of the Republic" including separation of federal powers. *See id.*

The rule of lenity thus ensures that a legislature's power to punish is only enforced when the legislation is clear, preventing non-legislative bodies from reading into the legislation what is not there. *See also Valenzuela-Gallardo v. Barr*, 968 F.3d 1053, 1059 (9th Cir. 2020) (reasoning that the power to write federal law resides only with elected officials in Congress and thus that deferring to BIA interpretation of an ambiguous statute raises constitutional concerns).

Here, the severe consequence of deportation militates in favor of reading statutory ambiguities in favor of the noncitizen, as the courts have historically recognized. To impose such a severe penalty based on the AG's flawed reading of the sentence definition in *Thomas/Thompson* does not provide noncitizens with the requisite notice and violates separation of federal powers. *See Sessions v. Dimaya*, 138 S. 1204, 1213 (2018) ("[T]he grave nature of deportation" is a "drastic measure often amounting to lifelong banishment or exile." (internal citations and quotation marks omitted)); *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010) ("We . . . have previously recognized that preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."); *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (reasoning that the rule of lenity applies in favor of noncitizens if there are statutory ambiguities in a dual-

application provision of the INA); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on [the noncitizen's] freedom beyond that which is required by the *narrowest* of several possible meanings of the words used.") (emphasis added)).

Here, no such indication, much less certainty, exists. Accordingly, this Court should read any statutory ambiguity in favor of noncitizens like Ms. Pacheco Vega.

III. FEDERAL COURTS DO NOT REVIEW AGENCY INTERPRETATIONS OF THE SENTENCE DEFINITION UNDER THE *CHEVRON* FRAMEWORK BECAUSE THE PROVISION IS A STATUTE WITH BOTH CIVIL AND CRIMINAL APPLICATION AND CONGRESS HAS NOT DELEGATED TO THE ATTORNEY GENERAL THE POWER TO DEFINE THE ELEMENTS OF CRIMINAL OFFENSES.

The separation of federal powers doctrine dictates that "only the people's elected representatives in Congress have the power to write new federal criminal laws." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). It also provides that and that "permitting executive officials to define the scope of criminal law could offend the doctrine of separation of powers." *Valenzuela-Gallardo*, 968 F.3d at 1059 ("Deferring to the BIA's construction of a statute with criminal applications raises serious constitutional concerns.").

Reviewing the Supreme Court's interpretations of the INA's aggravated felony provisions, which are also dual-application, is illustrative. Notably, the

Court has never conducted any such review under the *Chevron* framework. *See e.g., Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (rejecting the BIA's interpretation of the "sexual abuse of a minor" aggravated felony provision at 8 U.S.C. §1101(a)(43)(A) rather than deferring under *Chevron*); *Torres v. Lynch*, 136 S. Ct. 1619 (2016) (reviewing the arson-related aggravated felony provision in the INA without any reference to *Chevron* or the BIA's interpretation); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (same, regarding the drug trafficking aggravated felony ground in the INA without any reference to *Chevron*); *Valenzuela Gallardo*, 968 F.3d at 1059 (discussing the Supreme Court's consistent pattern of extending no deference to agency interpretation of dual application aggravated felony provisions and collecting cases).

In *Leocal*, the Court considered the BIA's determination that a state driving under the influence conviction was categorically a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F), 18 U.S.C. § 16. 543 U.S. 1, 3–4 (2004). In so doing, the Court never mentioned *Chevron* deference, but instead explicitly noted that 18 U.S.C. § 16 "is a criminal statute, and it has both criminal and noncriminal applications," where ambiguity must be resolved via the rule of lenity. *Leocal,* 543 U.S. at 11 n.8. According to the Court, the rule of lenity is applicable in such a situation because it is the judiciary's role to interpret the statute to ensure consistent meaning in both the criminal and civil context. *Id*.

The need for a consistent interpretation of dual application statutes suggests that federal agencies not authorized to interpret criminal statutes receive no deference when analyzing the meaning of dual application statute. Like the "crime of violence" definition at issue in *Leocal*, the agency's interpretation of the sentence definition in *Thomas/Thompson* should receive no deference because of its dual application.

The IIRIRA sentence definition serves a central function in determining whether certain prior convictions constitute "aggravated felonies" that mandate sentencing enhancements for federal criminal violations. Several aggravated felony provisions require a court-ordered sentence "for which the term of imprisonment is at least one year." *See e.g.*, 8 U.S.C. §§ 1101(a)(43)(F) (crimes of violence), (G) (theft and burglary offenses), (R) (commercial bribery, counterfeiting, forgery and related offenses), and (S) (obstruction of justice, perjury, and related offenses).

Aggravated felonies, in turn, are not only relevant for determining deportability, but they can also have significant criminal consequences. For example, the baseline maximum sentence for a previously removed noncitizen convicted of illegal reentry to the United States is two years, 8 U.S.C. § 1326(a). But a noncitizen who was previously removed following a conviction that qualifies as an aggravated felony is subject to a ten-fold enhancement of up to twenty-years

imprisonment under 8 U.S.C. § 1326(b). *See United States v. Resendiz-Ponce*, 549 U.S. 102, 105 (2007).

Consequently, not only will the AG's interpretation of the sentence definition in *Thomas/Thompson* expand the number of persons subject to deportation, but it will also result in increased criminal penalties for individuals convicted of illegal reentry. Individuals who cannot access the kinds of resentencing and modification procedures that *Thomas/Thompson* would regard as correcting "procedural or substantive" defects will be subject to greater sentences than those convicted in states where such procedures are available, or where the local court is competent to issue a resentencing order that will be respected under the new and heightened federal standard.

The sentence definition and its impact on sentence modifications therefore has such far-reaching implications for individual liberty and criminal punishment that it should be deemed a major policy question of the sort Congress simply would not leave to an agency to determine. *See, e.g., King v. Burwell*, 576 U.S. 473, 486 (2015) (holding that the Internal Revenue Service's interpretation of the Affordable Care Act's tax credits would not receive *Chevron* deference because it implicated significant economic and political questions).

This interpretive question is simply not reasonably within the delegation of authority given to the AG by Congress under the statute defining his powers,

which include nothing about the power to establish the elements of a federal criminal offense. *See De Jesus Rosa v. Att'y Gen.*, 950 F.3d 67, 79 (3d Cir. 2020) ("the Board is not entitled to deference under *Chevron* when interpreting" a criminal law "because the interpretation and exposition of criminal law is a task outside the BIA's sphere of social competence") (internal quotation omitted).

The INA assigns to the AG and Secretary of Homeland Security the charge of "administration and enforcement" of the INA and "all other laws relating to the *immigration and naturalization*" of noncitizens, not the charge of creating the elements of a criminal offense. 8 U.S.C. § 1103(a)(1) (emphasis added). Moreover, subsections (a) and (b) contain fifteen detailed sub-clauses, none of which mentions delegation of criminal law authority even once, despite having delegations as granular as contracting or buying land near an international land border, appropriating funds for clothing noncitizens held in custody, and authorizing foreign officers to be stationed in the United States. *See* 8 U.S.C. §§ 1103(b)(1)–(4); 1103(a)(11)(A); 1103(a)(8). Subsection (g), titled "Attorney General," further circumscribes the scope of Congress' delegation to the Attorney General to those "authorities and functions . . . relating to the immigration and naturalization of [noncitizens] as were exercised by the *Executive for Immigration Review*." 8 U.S.C. § 1103(g)(1) (emphasis added).

The Executive Office for Immigration Review has jurisdiction exclusively over civil immigration proceedings, and not over any aspect of criminal law. Finally, in sub-clause (g)(2), titled "Powers" of the Attorney General, the delegation includes issuing "regulations" and "review[ing] . . . administrative determinations in immigration proceedings," but again contains no mention of criminal offenses. 8 U.S.C. § 1103(g)(2). The concluding catchall provision, "perform such acts as the Attorney General determines necessary for carrying out this section," is wholly insufficient to include a delegation as substantial as creating the elements of a criminal offense. *Id. Cf. National Federation of Independent Business, et al. v. Department of Labor, Occupational Safety and Health Administration, et al.*, 142 S. Ct. 661, 665 (2022) ("The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not."); *Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018) (acknowledging a "textual limit" to delegation clauses within the INA, but finding in a separate context that the challenged delegation fell within the scope of authority); *Gundy v. United States*, 139 S.Ct. 2166, 2123-25 (2019) ("[T]he Attorney General's discretion extends only to considering and addressing feasibility issues," "but no more than that.").

The statute's language describing the agency's role in implementing Congress' immigration statute cannot be construed as an intelligible delegation of power authorizing agency officials to determine who is an aggravated felon subject

to automatic removal and who will be subject to a ten-fold sentence enhancement and potential imprisonment of up to twenty years. It would be profoundly unfair to defer to the AG's interpretation of the sentence definition while he simultaneously serves as the lead prosecutor of federal immigration crimes such as unlawful reentry. *See Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) ("To allow the nation's chief law enforcement officer to write the criminal laws [she] is charged with enforcing . . . to unite the legislative and executive powers . . . in the same person . . . would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority.")

Because the sentence definition is a dual application statute with profound policy implications that could not reasonably be within the agency's delegated authority, *Chevron* deference should not apply to the AG's interpretation of the sentence definition in *Thomas/Thompson*.

IV. IN THE ALTERNATIVE, SHOULD THE COURT FIND THE *CHEVRON* FRAMEWORK APPLIES, THE ATTORNEY GENERAL'S REINTERPRETATION OF THE SENTENCE DEFINITION IS OWED NO DEFERENCE AT *CHEVRON* STEP TWO BECAUSE IT IS UNREASONABLE.

If this Court determines that the statue is ambiguous and that the *Chevron* framework applies, it should nonetheless reject the AG's decision in *Thomas/Thompson* as unreasonable for three primary reasons.

First, *Thomas/Thompson* improperly extends the "conviction" definition's legislative history to the *sentence* definition, thereby conflating these two distinct concepts. *See, e.g.*, *State v. Hanes*, 790 N.W.2d 545, 549 (Iowa 2010) ("[P]enalties have nothing to do with the factual determination that a defendant did or did not commit a crime." (internal citation omitted)); *People v. Farrar*, 419 N.E.2d 864, 865–66 (N.Y. 1981) (distinguishing between the "court's role in sentencing and accepting a plea"). Unlike findings of guilt, sentencing is wholly within the purview of the trial judge, who must balance public and private interests represented in the criminal process and consider the specific circumstances of the individual before the court. *People v. Karson*, 68 N.Y.S.3d 315, 321–22 (N.Y. Co. Ct. 2017).

Second, *Thomas/Thompson* unreasonably ignores the history of decisional law recognizing resentencing in immigration cases, and Congress' evident awareness of those decisions in codifying a definition of sentence. *See supra* Section I.A.

Third and finally, *Thomas/Thompson* fails to consider the preemptive effective and other constitutional interference caused by withholding full legal effect from state criminal court resentencing orders. *See supra*, Section II.A.

As it is contrary to decades of BIA case law, clear statutory language, constitutional principles, and the specific nature of sentencing determinations, the AG's decision in *Thomas/Thompson* is unreasonable and must be overturned.

CONCLUSION

In *Thomas/Thompson*, the former Attorney General reversed decades of decisional law recognizing resentencing determinations in immigration cases. This is contrary to statute, contrary to constitutional structure, and fundamentally incorrect. *Amici* respectfully urge this Court to overrule the agency's unlawful and inaccurate statutory interpretation to avoid the imposition of harsh civil and criminal penalties on noncitizens who have had prior sentences modified.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is a certificate of compliance pursuant to Federal Rule of Appellate Procedure 32(g)(1). This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,958 excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f) and Third Circuit Local Rule 32.1. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies. The brief was scanned for viruses using Windows Security and no viruses were detected.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief and attached addendum with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on March 21, 2022. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that any party or counsel who are not registered CM/ECF users will be served a copy of the foregoing document by First-Class Mail, postage prepaid.

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