NON-DETAINED

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

In the Matter of:	)	**File No:**
In removal proceedings	)	

PROPOSED BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS, BLACK ALLIANCE FOR JUST IMMIGRATION, BROOKLYN DEFENDER SERVICES, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, HARVARD LAW SCHOOL CRIMMIGRATION CLINIC, IMMIGRANT JUSTICE IDAHO, NATIONAL IMMIGRATION LITIGATION ALLIANCE, OREGON JUSTICE RESOURCE CENTER, PRISONERS' LEGAL SERVICES OF NEW YORK, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, TAHIRIH JUSTICE CENTER, ST. THOMAS UNIVERSITY COLLEGE OF LAW IMMIGRATION CLINIC, & PROFESSOR MICHAEL WISHNIE IN SUPPORT OF RESPONDENT'S MOTION TO REOPEN

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*

Removal proceedings must be reopened when the criminal conviction underlying a removal order or barring immigration relief is vacated. Where the eliminated conviction was the basis for removal, as in Respondent's case, removal proceedings must be terminated. 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* show that Congress unambiguously wrote the statutory definition of the terms "conviction" and "formal judgment of guilt" to exclude prior convictions that have been vacated or otherwise eliminated under state law. *Amici* further show that in instances where a noncitizen files a motion to reopen because a prior conviction no longer constitutes a "conviction" under the INA, Congress has unambiguously required that removal proceedings be reopened for purposes of termination or a relief hearing.

This Board is not bound by agency precedents that purport to include certain vacated or otherwise eliminated convictions within the INA's "conviction" definition. *See Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (including within the "conviction" definition those convictions vacated solely due to "rehabilitation" or "immigration hardships"); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (en banc) (including within the "conviction" definition those convictions that have been expunged pursuant to state law). While *amici* submit that these decisions were never correct or authorized applications of the INA's "conviction" definition, these decisions are also incompatible with intervening decisions of the Supreme Court as to statutory interpretation and agency deference.

The Court's decisions in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), have reaffirmed—with added clarity— that agencies must exhaust traditional tools of statutory interpretation to discern congressional intent and apply a statute accordingly. *See also Rubalcaba v. Garland*, 998 F.3d 1031, 1037-38 (9th Cir. 2021); *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667, 676 (9th Cir. 2022). In *Roldan* and *Pickering*, this Board did not do so. The Board never applied several determinative statutory interpretation principles that unambiguously yield the conclusion that in codifying the terms "conviction" and "formal judgment of guilt" in 1996, Congress intended to continue the many decades of agency and federal court precedent giving full effect to state court vacatur and expungement orders in federal immigration proceedings. To stay within its statutory authority and to uphold the Constitution, this Board must correct the wrong precedents in *Pickering*, *Roldan*, and their progeny such as *Thomas & Thompson*, and correctly decide that the INA does not authorize for vacated or expunged convictions to be regarded as convictions and to uphold removal orders or bars to relief.

Amici are national organizations of immigration, civil rights, and criminal defense counsel and law professors who are experts in the interplay between federal immigration and state criminal law. *Amici* regularly file briefs on these issues with the Supreme Court, Circuit Courts of Appeals, and the Board. *See, e.g.*, *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021); *Mathis v. United States*, 579 U.S. 500 (2016); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Matter of B-Z-R-*, 28 I&N Dec. 563 (A.G. 2022). *Amici* represent thousands of noncitizens in immigration and criminal law proceedings and have a clear interest in correct interpretation of the immigration laws that give noncitizens the full benefits of their constitutional and statutory rights. *Amici* respectfully submit that this brief can assist this Board with correct and lawful adjudication of

Respondent Mr. 's motion to reopen, and with fashioning a rule of broad application that correctly gives effect to congressional intent to recognize state and federal court vacaturs of prior convictions in federal immigration proceedings.

ARGUMENT

I. The INA's "Conviction" Definition Excludes Prior Convictions That Have Been Vacated or Otherwise Eliminated by the Convicting Jurisdiction.

While federal immigration law governs the immigration consequences of a prior state conviction, Congress structured the immigration laws to defer to state criminal court judgments regarding whether a state disposition constitutes a conviction. That congressional intent is confirmed by the plain text and legislative history of the INA definition of "conviction," the context and structure of the INA, and application of traditional tools of statutory interpretation—all of which establish that a vacated or otherwise eliminated state conviction is not a "conviction" for purposes of the INA definition. Because a vacated conviction no longer exists for federal immigration purposes, that disposition cannot be the basis of any immigration consequence that relies on the INA's conviction definition.

To the extent that the Board has held that the INA definition of conviction includes any vacated or otherwise eliminated convictions, its holding and interpretation is contrary to the INA. *See, e.g.*, *Pickering*, 23 I&N Dec. at 624; *Roldan*, 22 I&N Dec. at 512.

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

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

With no statutory definition of "conviction" for immigration purposes for most of the twentieth century, the BIA almost always deferred to a state's determination for whether a

disposition constitutes a conviction. *See, e.g.*, *Matter of L-R-*, 8 I&N Dec. 269, 270 (BIA 1959); *Matter of G-*, 9 I&N Dec. 159, 164 (BIA 1960; AG 1961); *Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966; AG 1967); *see generally Pinho v. Gonzales*, 432 F.3d 193, 208 (3d Cir. 2005) ("The BIA held as early as 1943 that an expunged conviction was not a 'conviction' for immigration purposes, and adhered to that position with only occasional exceptions until *Roldan*."); *but see Matter of A-F-*, 8 I&N Dec. 429 (BIA 1959). Importantly, this meant that vacated or expunged convictions could not sustain charges of deportability. *See, e.g.*, *Matter of Sirhan*, 13 I&N Dec. 592, 600 (BIA 1970) (vacated convictions); *Matter of G-*, 9 I&N Dec. 159, 164 (BIA 1960, AG 1961) (expunged convictions).

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

> (1) a judge or jury has found the [noncitizen] guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
> (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed . . . and
> (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.

Id. at 551–52. Throughout this period, the Ninth Circuit similarly recognized that elimination of a conviction was respected within the federal immigration system. *See, e.g.*, *Estrada–Rosales v. I.N.S.*, 645 F.2d 819, 821 (9th Cir. 1981) (holding that a conviction invalidated through vacatur could not be the basis of deportation); *Wiedersperg v. I.N.S.*, 896 F.2d 1179, 1181 (9th Cir. 1990) (holding vacated conviction could not be grounds for deportability).

2. IIRIRA and Subsequent BIA Precedent

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

> (A)
> (i)
> a judge or jury has found the [noncitizen] guilty or the [noncitizen] has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii)
> the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen]'s liberty to be imposed.

INA § 101(a)(48)(A).

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

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

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

"post-conviction events, such as rehabilitation" and vacatur based on defect in underlying proceedings); *Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 708–13 (A.G. 2005).

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

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

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

BLACK'S LAW DICTIONARY 841-42 (6th ed. 1990). It is unambiguous that a formal judgment that has been vacated is not the final decision of the court, nor is it the last word in a judicial controversy, nor is it the final determination of the court—by definition, a vacated judgment has

been superseded by a subsequent judgment. Black's identified that "vacate" means, "To render an act void; as, to vacate an entry of record, or a judgment," *id.* at 1548, and that "expunge" means, "To destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information—including criminal records—in files, computers, or other depositories." *Id.* at 582.[1] Prior judgments rendered void are no longer judgments—they are void. Nor are judgments ordered to be destroyed or obliterated—they have been destroyed or obliterated.

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

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

Roldan and *Pickering* is an unauthorized expansion of the definition that is contrary to and inconsistent with unambiguous congressional intent.

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

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

> Ozkok, while making it more difficult for [noncitizen] criminals to escape such consequences, *does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the [noncitizen]'s future good behavior*. For example, the third prong of Ozkok requires that a judgment or adjudication of guilt may be entered if the [noncitizen] violates a term or condition of probation, without the need for any further proceedings regarding guilt or innocence on the original charge. In some States, adjudication may be "deferred" upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the [noncitizen] violates probation until there is an additional proceeding regarding the [noncitizen's] guilt or innocence. In such cases, the third prong of the Ozkok definition prevents the original finding or confession of guilt to be considered a "conviction" for deportation purposes. This new provision, by removing the third prong of Ozkok, clarifies Congressional intent that even in cases where adjudication is "deferred," the original finding or confession of guilt is sufficient to establish a "conviction," for purposes of the immigration laws.

H.R. Conf. Rep. No. 104-828, at 224 (1996) (emphasis added).[2]

[2] The full Conference Report is attached as Appendix A.

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

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

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

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

St. Cyr, 533 U.S. 289, 319 n.45 (2001) (applying presumption against retroactivity to conviction-related provision of INA, former section 212(c)).[3]

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

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

The prior construction canon provides that, when Congress has adopted language from authoritative decisional law, courts presume that Congress also intended to import the judicial and administrative interpretations of that language, unless there is clear indication to the contrary. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (explaining that "[w]hen the words of the Court are used in a later statute governing the same subject matter," courts should "give the words the same meaning in the absence of specific direction to the contrary"). *See also, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144–46 (2000) (discussing Congress's incorporation of prior agency action by Food and Drug Administration into subsequently codified statute); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90–91

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

(2007) (noting Congress adopted language originally drafted by the Secretary of Education without amendment and crediting this as evidence Congress did not intend to disturb the agency's interpretation of the relevant statutory language). With respect to the INA "conviction" definition, where Congress codified the very terms of art found in prior decisional law, the canon makes apparent that Congress intended to incorporate this longstanding deference to state vacatur and expungement decisions in proceedings under the Act.

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

The prior construction canon requires that statutes be interpreted to be consistent with prior jurisprudence when—as here—Congress adopts the words of prior court or agency precedent in a statute that governs the same subject matter, and "in the absence of specific

direction to the contrary." *Williams*, 529 U.S. at 434. The majority opinion in *Roldan* and the decision in *Pickering* fail to consider and account for prior agency and judicial construction of the conviction term, and misidentify congressional intent. In addition to the statute's plain text and legislative history, the prior construction canon makes even clearer that Congress intended to continue to make immigration consequences dependent on state disposition of criminal charges and to defer to the States on questions of convictions. *Roldan* and *Pickering* therefore must be overruled.

2. Federalism Canon: Congress intended for federal immigration law to defer to state determinations regarding convictions.

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

Vacatur and expungement of a state conviction fall within a state's constitutional police powers to regulate their own criminal laws. The federalism canon is rooted in the Constitution,

which provides that powers that are not specifically delegated to the federal government are reserved for the States. U.S. Const. amend. X, § 8. The Constitution's reservation of a generalized police power to the States "is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000). Consistent with these federalism principles, the States are sovereign with respect to defining and enforcing their own criminal laws, including laws defining convictions and sentencing. *See id.* at 618 (describing regulation of crime as a prime example of state police power denied to the federal government and reposed in the States); *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law." (internal quotation marks omitted)); *Heath*, 474 U.S. at 89 (explaining that "each State's power to prosecute is derived from its own 'inherent sovereignty, not the Federal Government'").

In the INA, Congress has not stated an intention to interfere with the States' constitutional police powers over their criminal laws. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). With respect to the INA conviction definition, Congress did not state any intent to disturb the States' authority with respect to defining and enforcing their criminal laws. To the contrary, by requiring a criminal court's "conviction," Congress continued to make the immigration consequences of a criminal case dependent on the state's adjudication of the criminal case. *See* INA § 101(a)(48) (requiring adjudication by a state court judge or jury for a state disposition to qualify as a "conviction"). Accordingly, the Board must recognize that § 101(a)(48)(A) defers to the States' traditional police powers over convictions.

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

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

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

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

harsher alternative, to require that Congress should have spoken in language that is clear and definite." (internal quotation marks omitted)).

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

Any ambiguities in the "conviction" definition should be resolved with the narrowest reading, which does not include those prior convictions that have been eliminated. *Cf. Crandon v. United States*, 494 U.S. 152, 158 (1990) (describing rule of lenity as a "time-honored" rule of statutory interpretation).

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

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

presumption as "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]").

The Supreme Court and federal courts apply this presumption (or immigration rule of lenity) when analyzing removability and bars to relief from removal based on convictions. *See, e.g.*, *St. Cyr*, 533 U.S. at 320 (applying "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]" to interpretation of a criminal conviction bar to relief eligibility under former INA sectiI212(c)); *Mendez v. Barr*, 960 F.3d 80, 87 (2d Cir. 2020) (applying the immigration rule of lenity in an analysis of what constitutes a "crime involving moral turpitude" under the INA); *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) ("'[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . . . [W]e will not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used.'" (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948))); *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975) ("It is settled doctrine that deportation statutes must be construed in favor of the [noncitizen].").

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.

As explained above, Congress legislated the INA to give full effect to state decisions to vacate or otherwise eliminate a prior conviction. *See supra* Sections I.A., I.B., I.C., I.D. The motion to reopen statute and implementing regulations, and the federal Constitution, further require that where a removal order is premised on a vacated prior conviction, the removal order must be eliminated, and the mechanism for doing so is the grant of a motion to reopen. This is true for three principle reasons.

First, the motion to reopen statutory provision and regulations show no congressional intent to abrogate deference to state criminal court judgments, and thus do not authorize the perpetuation of a removal order where the underlying conviction has been eliminated. The motion to reopen provision calls for reopening of proceedings based on "new facts." INA § 240(c)(7). The provision is 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. 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 element 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," INA § 240(c)(3)(A). Where such evidence is documentation of a prior conviction that has been vacated, this statutory standard can no longer be satisfied. 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. *Gregory*, 501 U.S. at 460–61; *see supra* Section I.D. Thus it is apparent that Congress intended to require the agency to reopen proceedings where the basis for a removal order no longer exists.

"The 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)). Where a removal order is based on a

conviction that has since been vacated, reopening removal proceedings is the mechanism to effectuate this congressionally mandated outcome.

Second, in addition to constitutional principles of federalism, comity requires that federal removal proceedings be reopened where a state has eliminated the conviction underlying removability or relief ineligibility. 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 governments[.]" *Younger v. Harris*, 401 U.S. 37, 44 (1971). Comity and our federalist system mandates that the federal government, in protecting federal rights and interests, "always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*; *see also supra* Section I.D. (establishing that principles of federalism confirm that Congress legislated the conviction definition to continue to defer to state criminal law determinations).

To persist with a federal removal in such a circumstance would violate this constitutional norm. Doing so would be particularly offensive to the States because it would attach severe consequences—deportations, family separations, restrictions on humanitarian relief, detention and restraints on liberty—to convictions the States deliberately saw fit to quash and prevent future legal consequences. 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. v. Lohr*, 518 U.S. 470, 475 (1996) (explaining that 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.'" (alterations in original) (citations 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.

Third, constitutional due process and equal protection concerns further compel that removal orders based on eliminated convictions be reopened. The Fifth Amendment guarantees that no person, including noncitizens, "shall be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V; *see Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (discussing due process rights of noncitizens). 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. *Cf. Nken v. Holder*, 556 U.S. 418, 436 (2009) ("[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.

The Fifth Amendment further "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."). Continuing to enforce removal orders that have no legal basis will almost exclusively affect noncitizens who are Black, Latinx, Indigenous migrants, Asian, and people of color, and therefore be tantamount

to race and national origin discrimination perpetrated by the federal government. *See* Alina Das, *No Justice in the Shadows: How America Criminalizes Immigrants* 83-85 (2020). For example, Black immigrants comprise only 5.4% of the unauthorized population in the United States and 7.2% of the total noncitizen population, but make up 20.3% of immigrants facing deportation on criminal grounds. *See* 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 Dec. 1, 2022). As another example, 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 (2001) (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.

III. Where the Conviction Underlying Removability or Relief Ineligibility No Longer Exists, Removal Proceedings Must Be Reopened, 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.

As explained *supra*, *see* Sections I.B., I.C. I.D., the INA and its implementing regulations require that removal proceedings be reopened where removability or relief ineligibility are based on a conviction that has been eliminated. 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,[4] 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 Reynaldo 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 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) (granting a motion to reopen and terminate where the conviction was vacated by criminal court).

For noncitizens, the Board's choice of procedural mechanism for reopening proceedings does not matter. Rather, the important—and often life-altering—aspect for noncitizens is that

[4] 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).

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 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, December 15, 2022

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PROOF OF SERVICE

On December 16, 2022, I, Andrew Wachtenheim, caused to be mailed or delivered a copy of the foregoing **PROPOSED BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS, BLACK ALLIANCE FOR JUST IMMIGRATION, BROOKLYN DEFENDER SERVICES, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, HARVARD LAW SCHOOL CRIMMIGRATION CLINIC, IMMIGRANT JUSTICE IDAHO, NATIONAL IMMIGRATION LITIGATION ALLIANCE, OREGON JUSTICE RESOURCE CENTER, PRISONERS' LEGAL SERVICES OF NEW YORK, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, TAHIRIH JUSTICE CENTER, ST. THOMAS UNIVERSITY COLLEGE OF LAW IMMIGRATION CLINIC, & PROFESSOR MICHAEL WISHNIE IN SUPPORT OF RESPONDENT'S MOTION TO REOPEN** and any attached pages to the following addresses:

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