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, OREGON JUSTICE RESOURCE CENTER, PRISONERS' LEGAL SERVICES OF NEW YORK, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, ST. THOMAS UNIVERSITY COLLEGE OF LAW IMMIGRATION CLINIC IN SUPPORT OF RESPONDENT'S BRIEF ON APPEAL

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*

When a prior conviction has been vacated, it no longer constitutes a "conviction" under the Immigration and Nationality Act ("INA"). INA § 101(a)(48)(A). To the extent this Board's precedents include vacated or expunged convictions within § 101(a)(48)(A), *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), those precedents must be overruled as unauthorized by law. While *amici* submit that these decisions were never correct or authorized applications of the INA's "conviction" definition, they are also unauthorized by subsequent statutory interpretation and agency deference decisions by the U.S. Supreme Court and the Ninth Circuit. *See Pereira v. Sessions*, 138 S. Ct. 2105 (2018); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *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).

The Supreme Court and the Ninth Circuit have reaffirmed—with added clarity— that agencies must exhaust traditional tools of statutory interpretation to discern congressional intent and apply a statute accordingly. In *Roldan* and *Pickering*, this Board did not do so. The Board never applied 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 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.*, *Garland v. Cordero-Garcia*, No. 22-331 (U.S., argued April 17, 2023); *Pugin v. Garland*, No. 22-23, (U.S., same); *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 and counsel noncitizens in immigration and criminal law proceedings and have a clear interest in the correct interpretation of 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 Mr. 's appeal, 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-1996 BIA and A.G. 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; A.G. 1961); *Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966; A.G. 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; A.G. 1959). Importantly, this meant that vacated or expunged convictions could not sustain charges of deportability or bar relief from removal. *See, e.g.*, *Matter of Sirhan*, 13 I&N Dec. 592, 600 (BIA 1970) (vacated convictions); *Matter of G-*, 9 I&N Dec. at 164 (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 for the first time codified a definition of "conviction." *See* INA § 101(a)(48)(A). In this definition, Congress adopted *Ozkok*'s first category of conviction—a "formal judgment of guilt"—verbatim. Congress adopted *Ozkok*'s second category—a deferred or withheld adjudication—almost verbatim. Congress codified the first two requirements of *Ozkok*'s tripartite test for withheld adjudications verbatim, and eliminated the third requirement:

> (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). The codified definition does not expressly include or even refer to vacated or expunged convictions, nor does the accompanying legislative history. *See* H.R. Conf. Rep. No.104-828, at 223–24 (1996).

Nevertheless, in a split en banc decision, a majority of this Board held in *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. at 521–23. 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[.]" *Roldan*, 22 I&N Dec. 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").

Then, in *Matter of Pickering*, this 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). This Board and former Attorney General John Ashcroft 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 Excludes Vacated or Expunged Convictions.

The plain text of § 101(a)(48)(A) defines two categories of convictions: (1) formal judgments of guilt and (2) certain withheld adjudications. It does not include any language referring to prior convictions that have been eliminated through vacatur, expungement, or other post-conviction measures, much less include any language expressly providing that convictions that no longer exist may continue to be deemed convictions for immigration purposes. The conviction definition therefore does not include prior convictions that have been eliminated.

This is the only reading consistent with legal and plain language dictionaries contemporaneous to codification, which the Supreme Court and this Court routinely consult to identify congressional intent, including in cases construing IIRIRA. *See, e.g.*, *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1938 (2022) (consulting Webster's Third International, Oxford English, and Black's Law dictionaries); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) (consulting "reliable dictionaries," such as Black's, to identify statutory meaning). *United States v. Prasad*, 18 F.4th 313, 319 (9th Cir. 2021) (consulting Oxford English and Black's Law dictionaries); *see also United States v. Kirilyuk*, 29 F.4th 1128, 1137 (9th Cir. 2022) ("consulting dictionary definitions" as one of the "ordinary tools of statutory interpretation"). Dictionaries in circulation at the time Congress codified § 101(a)(48)(A) reflect an understanding that the terms

"conviction" and "formal judgment of guilt" did not include prior dispositions eliminated through vacatur or expungement. Black's Law Dictionary defined "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 of guilt that has been vacated is not the "final decision of the court," nor is it the "last word" or "final determination" of rights. By definition, a judgment that has been vacated or expunged has been superseded by a subsequent judgment. The same edition of Black's defined "vacate" as: "To render an act void; as, to vacate an entry of record, or a judgment." *Id.* at 1548. It defines "expunge" as: "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.

Ordinary meaning dictionaries further confirm that an eliminated conviction falls outside of the INA's definition. The Plain Language Law Dictionary defined "judgment" as "the decision of a court having the appropriate jurisdiction to have tried the case; the final determination of a case." The Plain-Language Law Dictionary 254 (2d ed., newly rev. & expanded 1996) (capitalization removed). Several dictionaries defined "judgment" as akin to "[a] formal decision or determination on a matter or case by a court." Merriam Webster's Dictionary of Law 268 (1996). *See also, e.g.*, The Oxford English Reference Dictionary 765 (2d ed. 1996) ("the sentence of a court of justice; a decision by a judge"); Webster's New World Dictionary and Thesaurus 337 (1996) ("a legal decision; order given by a judge, etc."). "Expunge" was commonly understood to mean "obliterate," Plain-Language at 178, "erase," or "remove." The

Oxford Dictionary and Thesaurus 11 (Am. ed. 1996). *See also* Merriam Webster's Dictionary of Law 181 (1996) ("to cancel out or destroy completely"); Random House Compact Unabridged Dictionary 683 (Special 2d ed. 1996) ("wipe out or destroy"). "Vacatur" or "vacate" was commonly understood to mean "annul" or "void." Ballentine's Legal Dictionary and Thesaurus 697 (1995); *see also* The Oxford Encyclopedic English Dictionary 1593 (2d ed. 1995); Random House Compact Unabridged Dictionary 2100 (Special 2d ed. 1996) ("to render inoperative; deprive of validity; void; annul: *to vacate a legal judgment*"); Webster's New World Dictionary and Thesaurus 679 (1996). *See also Vacating a judgment*, Plain-Language at 511 ("[c]ancelling or rescinding a court decision (judgment)" (capitalization removed).

These dictionaries confirm that, at the time Congress codified the "conviction" definition, the terms "conviction" and "formal judgment of guilt" unambiguously excluded prior judgments that had been eliminated through vacatur or expungement. The statute's meaning is plain. *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. Instead, Congress chose terms that are both commonly and historically understood to exclude convictions eliminated by measures such as 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 U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). 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. As a consequence, the Board's including vacated and expunged judgments in the "conviction" definition through *Roldan* and *Pickering* is contrary to and unauthorized by statute and must be reversed.

C. IIRIRA's Legislative History Confirms That the "Conviction" Definition Excludes Vacated and Expunged Convictions.

The legislative history of § 101(a)(48)(A) further clarifies that Congress, in codifying the "conviction" definition, did not intend for it to include vacated and expunged convictions. The Congressional Committee Conference Report accompanying the enactment of § 101(a)(48)(A) shows that Congress adopted the *Ozkok* definition and altered 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:

> 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).

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. *See* H.R. Conf. Rep. No. 104-828, at 223–24. This Board must adapt its case law to recognize Congress' unambiguous intent to continue deferring to vacatur, expungement, and other measures for eliminating prior convictions.

D. Applicable Statutory Interpretation Principles Further Confirm That the "Conviction" Definition Excludes Vacated or Expunged Prior Convictions.

Applying traditional tools of statutory construction further confirms that the "conviction" definition unambiguously excludes 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 Court has long applied interpretive canons to properly understand the INA. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S.

421, 446–48 (1987); *INS v. St. Cyr*, 533 U.S. 289, 319 n.45 (2001).[1] Recently, the Court has reaffirmed that agencies must exhaust traditional tools of statutory interpretation to discern congressional intent. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2113-14, 2113 n.4 (2018); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

Roldan and *Pickering* do not apply or discuss statutory interpretation principles germane to understanding the true and unambiguous meaning of the "conviction" definition. 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 vacated or expunged convictions.

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.

When it enacted § 101(a)(48)(A), Congress codified terms of art with a long history of settled meaning in immigration law: "conviction," and "formal judgment of guilt." The prior construction canon provides that, when Congress adopts 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*

[1] 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).

& Williamson Tobacco Corp., 529 U.S. 120, 144–46 (2000) (discussing Congress's incorporation of prior agency action by Food and Drug Administration into subsequently codified statute); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90–91 (2007) (noting Congress adopted language originally drafted by the Secretary of Education without amendment and crediting this as evidence Congress did not intend to disturb the agency's interpretation of the relevant statutory language). This statutory interpretation principle applies in this context and makes apparent that Congress unambiguously intended to incorporate the 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 "conviction" definition, 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, in codifying the "conviction" definition, Congress 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" and "formal judgment of guilt," which generally deferred to a state's (or federal court, in the case of a federal criminal conviction) own categorization of its criminal dispositions, including decisions and procedures that vacate, expunge, or otherwise eliminate a prior conviction.

The majority opinion in *Roldan* and the decision in *Pickering* entirely neglect that the terms "conviction" and "formal judgment of guilt" come directly from longstanding judicial and administrative immigration law decisions. Consequently, *Pickering* and *Roldan* fail to identify that Congress unambiguously intended to continue to find that a "conviction" exists for immigration purposes only where it continues to exist in the convicting jurisdiction as well. To the extent they hold to the contrary, *Roldan* and *Pickering* 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 terms "conviction" and "formal judgment of guilt" do not include convictions that a state has decided to expunge or vacate.

Vacatur and expungement of state convictions 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 authority of the States to define and enforce their criminal laws. To the contrary, Congress continued to make the immigration consequences of a criminal case dependent on the state's adjudication of the criminal case, by making the finding of a "conviction" depend on the actions of state courts, judges, and juries. *See* INA § 101(a)(48). Accordingly, the Board must recognize that § 101(a)(48)(A) defers to the States' traditional police powers over convictions, and gives full effect to measures that expunge, vacate, and otherwise eliminate prior 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 "conviction" definition must be resolved by narrowing the term's punitive reach by giving full effect to vacatur and expungement measures.

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, the "time-honored" criminal rule of lenity would be applied to resolve any such ambiguity in favor of defendants. *Crandon v. United States*, 494 U.S. 152, 158 (1990). Applying the criminal rule of lenity further confirms that the "conviction" definition excludes vacated and expunged prior convictions.

The "conviction" definition is a term of dual civil and criminal application. In addition to its role in civil immigration proceedings before the Executive Office for Immigration Review and Department of Homeland Security, it is an element of several criminal provisions of the INA that are prosecuted in federal district court by the U.S. Attorney's Office. *See* INA §§ 274C, 276(b). The Supreme Court mandates that ambiguities in dual application terms be construed narrowly by applying the criminal rule of lenity.

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 Supreme Court applies the criminal rule of lenity to resolve ambiguities in dual application terms. *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). The Court does so to dual application terms in the INA. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Any ambiguities in the "conviction" definition must be resolved with the narrowest reading to exclude prior convictions that have been eliminated.

4. Presumption Against Deportation: Any ambiguity in the "conviction" definition must be resolved in favor of noncitizens by giving full effect to vacatur and expungement measures.

As with the criminal rule of lenity, the Supreme Court requires that ambiguities in the INA be resolved in favor of noncitizens under the presumption against deportation (sometimes referred to as the immigration rule of lenity). *See Cardoza-Fonseca*, 480 U.S. at 449 (describing "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]"). The Supreme Court and federal courts apply this statutory interpretation principle when parsing the scope of conviction-based removability and relief provisions. *See, e.g.*, *St. Cyr*, 533 U.S. at 320 (applying the principle to narrow the conviction bars to relief under former § 212(c)); *Mendez v. Barr*, 960 F.3d 80, 87 (2d Cir. 2020) (applying the principle to identify the scope of the term "crime involving moral turpitude"). "It is settled doctrine that deportation statutes must be construed in favor of the [noncitizen]." *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975). As such, any ambiguities in the "conviction" definition must be resolved in favor of noncitizens consistent with the presumption against deportation.

"[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." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

II. THE BOARD SHOULD CERTIFY RESPONDENT'S CASE TO ATTORNEY GENERAL GARLAND SO THAT THE OFFICE OF THE ATTORNEY GENERAL CAN CORRECT THE UNAUTHORIZED AND INCORRECT PRECEDENTIAL DECISIONS THAT CONTINUE TO TREAT VACATED AND OTHERWISE ELIMINATED CONVICTIONS AS "CONVICTIONS" UNDER THE INA.

As explained above, Congress legislated the INA to give full effect to state decisions that vacate or otherwise eliminate a prior conviction. *See supra* Sections I.A., I.B., I.C., I.D. Nevertheless, beginning with *Roldan* in 1999, the Board has issued removal orders against noncitizens who no longer have a prior conviction that authorizes removal, thereby violating the INA and the Constitution. For three principal reasons, it is both necessary and appropriate for Attorney General Garland to certify to his office, *see* 8 C.F.R. 1003.1(h), the legal question of whether a conviction vacated or otherwise eliminated by the convicting jurisdiction falls within the INA's "conviction" definition.

First, there is considerable precedent for the Office of the Attorney General to certify this question of law for review. In several cases over the course of decades, former Attorneys General have done so. *See supra*, Section I.A.; *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019); *Matter of Luviano-Rodriguez*, 23 I&N Dec. 718 (BIA 1996; A.G. 2005); *Matter of Marroquin-Garcia*, 23 I&N Dec. 705 (BIA 1997; A.G. 2005); *Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966 BIA; A.G. 1967); *Matter of G-*. 9 I. & N. Dec. 159, 167 (BIA 1960; A.G. 1961); *Matter of A-F-*, 8 I&N Dec 429 (BIA 1959; A.G. 1959). Notably, with respect to the post-

IIRIRA codified "conviction" definition, every Attorney General decision was issued by an Attorney General serving under a Republic administration.

Second, the *Roldan* decision was deeply fractured, with a vociferous dissent finding the newly codified "conviction" definition did nothing to alter the prior decades of decisional law giving full effect to vacatur and expungement measures. *See Roldan*, 22 I&N Dec. at 531–32 (Bd. Member Villageliu, et al., dissenting in part and concurring in part). In addition, the Board has issued *amicus* invitations regarding the scope of the "conviction" definition but has not issued a published decision in those cases. *See, e.g.*, Amicus Invitation No. 18-06-27 (Amended), Validity of a Conviction for Immigration Purposes, *available at* https://www.justice.gov/eoir/page/file/1074676/download. However, the Board has issued precedential decisions regarding post-conviction and sentencing relief *without* issuing an *amicus* invitation. *See, e.g.*, *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018). Attorney General Garland's certification is appropriate and necessary to clarify and correct the agency's position on these important issues.

Attorney General Garland is a revered legal figure who spent decades on the highest appellate court in the United States below the U.S. Supreme Court. *See* U.S. Department of Justice, Staff Profile, Attorney General Merrick B. Garland, *available at* https://www.justice.gov/ag/staff-profile/meet-attorney-general. He was nominated to serve as an Associate Justice on the Supreme Court, but his nomination was never entertained, over widespread outrage. *See* Melanie Garunay, National Archives, *Here Are 55 Editorials Calling for a Hearing on President Obama's Supreme Court Nominee* (Mar. 18, 2016), *available at* https://obamawhitehouse.archives.gov/blog/2016/03/18/two-days-55-newspaper-editorial-boards-called-senate-republicans-hold-hearings. In addition to the critical human impact of this

legal question, at its core it is also a question of statutory interpretation and agency law, which are legal principles where Attorney General Garland's views are balanced and expert. *See* Congressional Research Service, *Judge Merrick Garland: His Jurisprudence and Potential Impact on the Supreme Court* 19 (Apr. 27, 2016), *available at* https://www.everycrsreport.com/files/20160427_R44479_5be4de72ef5dffd0a75badb21e3c4a74a11ab1b7.pdf ("Judge Garland's approach to statutory interpretation can be seen to resemble other judges' approaches").

Third, the precedents in *Roldan*, *Pickering*, and *Thomas & Thompson* cause cognizable race and national origin discrimination in the criminal and immigration systems and violate the Constitution, requiring Attorney General Garland's correction. These precedents almost exclusively affect noncitizens who are Black, Latinx, Indigenous migrants, Asian, and people of color. *See* Alina Das, *No Justice in the Shadows: How America Criminalizes Immigrants* 83-85 (2020) (discussing the disparate impact of U.S. criminal and immigration laws against noncitizens who are people of color). The Fifth Amendment "prohibit[s]" this kind of "invidious[] discriminat[ion] between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)). *See also 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."). By disproportionately imposing deportations and adverse immigration consequences on noncitizens who are people of color, these precedents discriminate. *See Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 498, 505–06 (9th Cir. 2016) (finding unconstitutional 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). Attorney General Garland must certify and correct these questions of law and construe § 101(a)(48)(A) to give full effect to expungement and conviction measures to avoid "grave doubts" about the INA provision's constitutionality. *See United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.").

CONCLUSION

The INA's "conviction" definition excludes prior convictions that have been vacated, expunged, or otherwise eliminated. Because the Respondent in this case no longer has a conviction that would bar eligibility for relief, this Board must properly interpret and apply the INA to find that he has no relief-disqualifying conviction and allow him to proceed with an application for cancellation of removal.

Respectfully Submitted, April 20, 2023

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PROOF OF SERVICE

On April 20, 2023, I, Amelia Marritz, caused to be mailed or delivered a copy of the foregoing **REQUEST TO APPEAR AS AMICI CURIAE** and **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, OREGON JUSTICE RESOURCE CENTER, PRISONERS' LEGAL SERVICES OF NEW YORK, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, ST. THOMAS UNIVERSITY COLLEGE OF LAW IMMIGRATION CLINIC IN SUPPORT OF RESPONDENT'S BRIEF ON APPEAL** and any attached pages to the following addresses:

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