No. 21-6323

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KWAME SIRIBOE,
Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals Agency No.

BRIEF OF *AMICI CURIAE* HARVARD LAW SCHOOL CRIMMIGRATION CLINIC AND 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, Tiffany J. Lieu, as counsel for *Amici Curiae*, state 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: January 4, 2022

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Constitutional Provisions

STATEMENT OF INTEREST[1]

Amici Curiae are organizations with expertise concerning the intersection of criminal law and immigration law. The Harvard Law School Crimmigration Clinic teaches law students how to advocate for immigrants' rights by engaging in direct representation, policy advocacy, and impact litigation at the intersection of criminal law and immigration law. The Clinic's staff and faculty have published scholarly articles, including on the conviction definition at issue here.

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.

Amici seek to improve the quality of justice for immigrants accused of crimes and therefore have a keen interest in ensuring that immigration law is

[1] Pursuant to Federal Rule of Appellate Procedure ("FRAP") 29(a)(4)(E), *amici* state that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to FRAP 29(a)(2), *amici* further state that Respondent is unopposed to the filing of this *amici* brief.

correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights. *Amici* have 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.

I. INTRODUCTION

Amici curiae urge this Court to reject the Board of Immigration Appeals' ("BIA" or "Board") decision in *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzale*s, 465 F.3d 263 (6th Cir. 2006), because it erroneously interprets the definition of "conviction" under 8 U.S.C. § 1101(a)(48)(A) to include vacated convictions.[2] In *Matter of Pickering*, the Board held that state convictions remain convictions for immigration purposes even after they are vacated by the state if the reasons for vacating do not relate to a "procedural or substantive defect" in the underlying criminal proceedings. 23 I. & N. Dec. at 621, 624. The Board so held even though neither the statute nor legislative history mention, much less contemplate, vacated convictions. The Court should vacate *Matter of Pickering* for several reasons.

First, the BIA's interpretation of the conviction definition in *Matter of Pickering* is owed no deference under the *Chevron* framework because it has dual

[2] *Amici* use the term "vacated convictions" to include all convictions eliminated under state law, such as expunged convictions, regardless of states' specific terminology.

applications in both civil and criminal law. It is axiomatic that, within the U.S. Constitution's careful separation of powers, only Congress has the authority to create federal criminal laws. It follows, as the Supreme Court has repeatedly held, that executive agencies are owed no deference to interpretations of statutes that may have criminal applications, lest those agencies effectively legislate in the criminal realm in violation of separation of powers. The conviction definition under 8 U.S.C. § 1101(a)(48)(A) is one such statute with both civil and criminal applications, and accordingly the interpretive question lies solely with this Court.

Second, the statute unambiguously does not include vacated convictions. The plain text of 8 U.S.C. § 1101(a)(48)(A) nowhere mentions or contemplates vacated convictions. This plain meaning is bolstered by decades-long precedent in which courts and the BIA deferred to states to determine whether a state disposition constitutes a conviction. If the Court looks beyond the statute's plain meaning, the prior construction and federalism canons of interpretation unambiguously confirm that vacated convictions are not included in the conviction definition for immigration purposes. Finally, to the extent there is any remaining ambiguity, the rule of lenity forecloses *Matter of Pickering*'s inclusion of vacaturs in the conviction definition.

Finally, even if this Court finds that the *Chevron* framework applies, *Matter of Pickering* violates the Administrative Procedure Act and is accordingly

unreasonable at *Chevron* step two. Indeed, the BIA failed to consider relevant factors, including proper statutory construction and federalism principles prohibiting invading traditional state powers of defining criminal laws without clear congressional authority.

Accordingly, *Amici Curiae* urge this Court to vacate the BIA's erroneous interpretation of the conviction definition in *Matter of Pickering* and remand Mr. Siriboe's case.

II. ARGUMENT

A. The BIA's Interpretation of the Conviction Definition Is Owed No Deference Because the Definition Has Both Civil and Criminal Applications.

The Supreme Court has repeatedly held that, to preserve separation of powers, only Congress may write new criminal laws. *See United States v. Davis*, 139 S. Ct. 2319, 2323 (2019) ("Vague laws . . . hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges."). Accordingly, executive agencies are not entitled deference when interpreting statutes that may have criminal consequences. This Court must not defer to the BIA's interpretation of the INA's definition of conviction in *Matter of Pickering* because 8 U.S.C. § 1101(a)(48)(A) is a statute that has both civil and criminal applications.

1. Separation of powers principles preclude applying *Chevron* to agency interpretations of statutory provisions that have criminal applications.

It is axiomatic that the U.S. Constitution sets out "carefully defined limits" on the three branches of government, and that the separation of powers "must not be eroded." *INS v. Chadha*, 462 U.S. 919, 957–58 (1983). Within this separation of powers, Congress has the sole constitutional authority to define federal criminal offenses and prescribe criminal punishments. *See, e.g.*, *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) ("Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences."); *Whalen v. United States*, 445 U.S. 684, 689 (1980) ("[W]ithin our federal constitutional framework . . . the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.").

Consistent with these principles, the Supreme Court has made clear that, while courts may defer to agency decisions in purely civil matters, courts should not defer to an agency's interpretation of a criminal statute. *See Abramski v. United States*, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for courts, not for the Government, to construe."); *United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is

entitled to any deference."). Such agency deference is inappropriate for statutes with criminal consequences because it allows agencies, rather than Congress, the ability to effectively "create (and uncreate) new crimes at will." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Mem.). Thus, "Congress cannot, through ambiguity, effectively leave" its authority to define crimes "to the administrative bureaucracy." *Id.* at 354.

The same holds true for agency interpretations of statutes that have dual applications in the civil and criminal contexts. *See, e.g.*, *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992). In *Thompson*, a plurality of the Supreme Court declined to grant *Chevron* deference to the Bureau of Alcohol, Tobacco and Firearms ("ATF"), even though the statute at issue was a civil tax law. *Id.* In so doing, the Court reasoned that the *Chevron* framework did not apply and thus that deference was inappropriate because the statute had both civil and "criminal applications." *Id.*; *see also Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1059–62 (9th Cir. 2020) (discussing the "serious constitutional concerns" of deferring to the BIA's interpretation of aggravated felony but reluctantly applying *Chevron* framework because it was bound by law of the case doctrine). *But see Aposhian v. Barr*, 958 F.3d 969, 982–84 (10th Cir. 2020); *Guedes v. ATF*, 920 F.3d 1, 23–27 (D.C. Cir. 2019).

The Supreme Court has specifically adopted this reasoning to the immigration context. For example, the Court has never applied the *Chevron* framework when reviewing the BIA's construction of the INA's aggravated felony provisions, which are also dual application.[3] And in *Leocal v. Ashcroft*, the Court declined to apply the *Chevron* framework to the BIA's interpretation of the "crime of violence" aggravated felony ground, 18 U.S.C. § 16; 8 U.S.C. § 1101(a)(43)(F), and whether a driving under the influence conviction categorically constitutes an aggravated felony. 543 U.S. 1, 5 n.2, 11 n.8 (2004). The Court emphasized that although it was interpreting § 16 in the deportation context—i.e., its civil application—§ 16 had both civil and criminal applications. *Id.* In light of the statute's dual application, the Court refused to defer to the BIA's interpretation of § 16 to ensure consistent interpretation of the provision in both the criminal and civil context.

Chevron's inapplicability to dual application statutes flows in part from the need for courts to consistently interpret statutes. Given that the *Chevron*

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[3] *See Moncrieffe v. Holder*, 569 U.S. 184, 206 (2013) (overturning BIA's interpretation regarding scope of aggravated felony definition without referencing *Chevron*); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010) (same); *Torres v. Lynch*, 578 U.S. 452, 454 (2014) (determining scope of what constitutes an "aggravated felony" without referencing *Chevron*); *Kawashima v. Holder*, 565 U.S. 478, 482–90 (2012) (same); *Nijhawan v. Holder*, 557 U.S. 29, 33–43 (2009) (same); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 188–94 (2007) (same); *Lopez v. Gonzales*, 549 U.S. 47, 50 (2006) (same).

framework applies to resolve statutory ambiguities in the civil context and the rule of lenity applies in criminal contexts, a court may interpret an ambiguous dual application statute differently in civil versus criminal contexts. Under *Chevron*, a court can resolve an ambiguous civil statute *against* an individual, *see, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 217–22 (2002) (deferring to Social Security Administration's interpretation of ambiguous statutory provisions against individual), whereas under the rule of lenity, a court must resolve a criminal statute's ambiguity *in favor* of the defendant, *Davis*, 139 at 2333. Because courts "must interpret . . . statute[s] consistently, whether [they] encounter its application in a criminal or noncriminal context," the *Chevron* framework must yield to the rule of lenity in ambiguous dual application statutes. *Leocal*, 543 U.S. 1, 11 n.8; *see also United States v. Santos*, 553 U.S. 507, 522 (2008) ("The meaning of words in a statute cannot change with the statute's application.") (superseded in other part by statute).[4] Accordingly, in light of the need for courts to consistently interpret statutes, federal agencies not authorized to interpret criminal statutes receive no deference when interpreting statutes with dual applications.

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[4] Neither *United States v. O'Hagan*, 521 U.S. 642 (1997), nor *Babbit v. Sweet Home Chapter, Communities for Great Ore*, 515 U.S. 687 (1995) alter this analysis. Neither of those decisions involved immigration matters, and both involve instances where Congress has delegated to agencies the authority to proscribe criminal offenses. By contrast, Congress did not delegate criminal lawmaking authority to the Attorney General in the INA. *See* 8 U.S.C. § 1103(a).

Thus, applying the *Chevron* two-step framework to agency interpretations of dual application statutes violates separation of powers principles and is, accordingly, impermissible. Only courts, not executive agencies, can interpret such statutes.

2. The INA's definition of conviction has dual applications, and thus the *Chevron* two-step framework does not apply to the BIA's interpretation of 8 U.S.C. § 1101(a)(48)(A).

The conviction definition in the INA has both civil and criminal consequences. In the civil context, 8 U.S.C. § 1101(a)(48) attaches consequences such as deportation. For example, a noncitizen who was admitted into the United States but is subsequently deemed to have been convicted of a crime involving moral turpitude ("CIMT") is deportable, 8 U.S.C. § 1227(a)(2)(A)(i), and ineligible for certain forms of discretionary relief, *see, e.g.*, *id.* § 1182 (rendering noncitizens with CIMTs inadmissible and disqualified from certain forms of relief). Once deported, that noncitizen is permanently barred from re-entering the country. *Id.* § 1182(a)(9)(A).

The conviction definition also has criminal applications. Under 8 U.S.C. § 1326, a noncitizen is guilty of unlawful reentry if that person, subject to certain exceptions, "has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding," and subsequently reenters the country. *Id.* § 1326(a). A noncitizen

may be sentenced to a maximum of two years for this offense. *Id*. But that sentence increases if the noncitizen was removed subsequent to certain convictions. Individuals who were ordered removed "subsequent to a conviction for commission of an aggravated felony" are subject to a maximum twenty-year sentence rather than the default maximum two-year sentence. *Id.* § 1326(b)(2). Similarly, the maximum penalty increases to ten years for noncitizens who were removed "subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)." *Id.* § 1326(b)(1).[5] The INA thus attaches "criminal penalties" based on the conviction definition. *Id.* § 1326(b).

Because the INA's conviction definition has dual civil and criminal applications, the *Chevron* framework does not apply to grant any deference to the BIA's interpretation. Indeed, deference to an executive agency on this interpretive question with serious criminal consequences broaches the careful delineation of power between the branches.

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[5] The conviction definition at 8 U.S.C. § 1101(a)(48) applies in both the immigration context (e.g. 8 U.S.C. §§ 1227, 1228, 1182) and the criminal context (i.e., 8 U.S.C. § 1326). That is so because § 1101 is the definitional provision of the INA that defines terms, including conviction, as used throughout the INA. 8 U.S.C. § 1101 (defining terms "[a]s used in this chapter," Title 8, Chapter 12 of the United States Code, which includes inter alia 8 U.S.C. §§ 1227, 1228, 1182, and 1326).

While this Court in *Saleh v. Gonzales*, 495 F.3d 17, 22 (2d. Cir. 2007), deferred to the BIA's interpretation of the conviction definition, that case should not control here. As a preliminary matter, *Saleh* is factually distinct. While *Saleh* involved an *amended* conviction and the noncitizen presented "no evidence or argument . . . identif[ying] any substantive or procedural defects in [his] conviction," *id.* at 20, the convictions at issue here undisputedly were vacated pursuant to a state law that allows for vacatur only when the "judgement was obtained in violation of a right of the defendant under the constitution of this state or of the United States." Certified Administrative Record at 4. *Cf. Bd. of Educ. v. Schutz*, 290 F.3d 476, 483 n.7 (8th Cir. 2002) (declining to apply a circuit case where it was factually distinct). Moreover, *Saleh* inappropriately applied the *Chevron* framework without considering the dual application nature of the conviction definition. By focusing only on the civil consequences of the conviction definition without once mentioning the term's criminal application under § 1326, *Saleh* fails to give effect to the separation of powers concerns inherent in deferring to an executive agency's interpretation of a statute with criminal consequences.[6]

[6] The Court similarly erred in applying the *Chevron* framework to the BIA's interpretation of the finality requirement for convictions in *Brathwaite v. Garland*, 3 F.4th 542, 547–48 (2d Cir. 2021), because it failed to consider the dual application nature of the term conviction.

Deference to the BIA's interpretation of the term conviction in this case and *Matter of Pickering* is erroneous because of the dual contexts in which the term applies and violates the constitutional mandate of separation of powers. Consequently, the *Chevron* framework does not apply to the Board's interpretation of 8 U.S.C. § 1101(a)(48). This Court accordingly must interpret the conviction definition without deference to *Matter of Pickering*.

B. The Conviction Definition Unambiguously Does Not Include Vacated Convictions under the Statute's Plain Meaning and Traditional Canons of Interpretation.

Nowhere in the plain text of 8 U.S.C. § 1101(a)(48) does the statute contemplate vacated convictions in the conviction definition for immigration purposes. This plain meaning is bolstered by decades-long precedent deferring to states to determine whether a criminal disposition constitutes a conviction. Even beyond the statute's plain meaning, the prior construction and federalism canons of interpretation unambiguously confirm that the conviction definition does not include vacated convictions. Finally, to the extent there is any remaining ambiguity, the rule of lenity forecloses *Matter of Pickering*'s interpretation that the definition includes vacated convictions.

1. The plain text of the statute excludes vacated convictions.

"Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well." *United States v. Razmilovic*, 419 F.3d

134, 136 (2d Cir. 2005) (internal citation omitted). When language in the INA is unambiguous, courts do "not owe the BIA any deference in the interpretation" of a statute, even where the *Chevron* framework applies. *Centurion v. Sessions*, 860 F.3d 69, 77 (2d Cir. 2017).

On its face, § 1101(a)(48)(A) unambiguously does not include vacated convictions. The provision does not reference expunged or vacated convictions, and the plain meaning of the word "conviction" does not include dispositions that have been vacated. A conviction is defined as "legal proof or declaration of guilt." *Oxford Eng. Dictionary*, Conviction. Vacated convictions, however, "are invalid judgments that may not be used to establish . . . guilt." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 365 (2016). When a disposition can no longer be used to establish guilt, it is no longer a conviction. Thus, the plain text of the INA does not include vacated convictions, and this Court should not read vacated convictions into this statutory silence. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 360–361 (2019) ("It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'") (internal citation omitted).

2. Matter of Pickering's interpretation of conviction to include vacaturs erroneously departed from decades of settled practice.

The legislative and judicial history of the conviction definition supports this plain text reading. For decades prior to 1998, the Board and courts deferred to

states' determinations as to whether a state disposition was sufficiently final to trigger immigration consequences. *See* Philip L. Torrey, *Principles of Federalism and Convictions for Immigration Purposes*, 36 Immigr. & Nat'y L. Rev. 3, 9–17 (2016). Despite this long history, the Board in *Matter of Pickering* erroneously expanded the definition of conviction and eliminated deference to states' criminal laws. *See* 23 I. & N. Dec. at 624.

i. Prior to 1998, well-established case law required immigration adjudicators to give full effect to state vacaturs of criminal convictions.

For most of the twentieth century, deference to the states was the keystone to interpreting convictions for federal immigration purposes. *See* Torrey, *supra*, at 10. Under this decades-long jurisprudence developed at common law, the Board and courts looked to a state's criminal procedure laws to determine whether the state deemed the criminal disposition sufficiently final and a conviction for state law purposes. *Id*. at 12. Only when a conviction was final in the state's eyes would immigration consequences attach. *Id*. at 10–11; *see also Pino v. Landon*, 349 U.S. 901, 901 (1955) (per curiam) (holding that a Massachusetts guilty file disposition had not "attained such finality as to support an order of deportation" under the INA).

In 1988, the Board sought to make the finality requirement compatible with differing laws across the states in *Matter of Ozkok*, 19 I. & N. Dec. 546, 550 (BIA

1988). *Matter of Ozkok* enumerated three requirements for determining when a state disposition qualified as a conviction for immigration purposes: (i) a guilty finding; (ii) a court-ordered punishment; and (iii) sufficient finality such that no further proceedings were necessary to determine the individual's guilt or innocence. *Id.* at 551–52. The Board continued to affirm deference to the states. *Id.* at 551 (stating that, to test finality where adjudication of guilt is withheld, "further examination of the specific procedure used and the state authority under which the court acted will be necessary").

ii. The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA") did not explicitly alter well-established case law recognizing state vacaturs of convictions.

In 1996, Congress codified the definition of a conviction for the first time in the INA through IIRAIRA. Nowhere in the statutory text or legislative history does Congress mention vacated convictions. *See* 8 U.S.C. § 1101(a)(48)(a); H.R. Conf. Rep. No.104-828, at 223–24 (1996) (hereinafter, "Conf. Rep."). In the wake of IIRAIRA, the Board departed from decades-long jurisprudence deferring to states' categorization of their criminal dispositions. *See, e.g.*, *Matter of Punu*, 22 I. & N. Dec. 224, 227 (BIA 1998). The Board based its erroneous interpretation of the conviction definition on an incomplete analysis of IIRAIRA's legislative history, determining that Congress intended to broaden the conviction definition beyond

what was laid out in *Matter of Ozkok*. *See Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 518 (BIA 1999); *Punu*, 22 I&N Dec. at 227. However, the Board failed entirely to consider the text of the statute, apply appropriate statutory interpretation principles, or acknowledge the statute's silence as to vacaturs.

Had the Board done so, it would have recognized that Congress intended to retain the common-law definition and deference to state adjudications that courts had employed for decades. *See supra* Section II.B.2.i. Indeed, Congress adopted the first two prongs of the *Ozkok* test verbatim, and omitted only the third. *Compare* 8 U.S.C. § 1101(a)(48)(A), *with Matter of Ozkok*, 19 I. & N. Dec. at 551–52. As Congressional Committee Conference Reports demonstrate, Congress's focus in codifying the conviction definition without the third *Ozkok* prong was limited to deferred adjudications. Conf. Rep. at 224. The Report stated that *Matter of Ozkok* "does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the [noncitizen's] good behavior." *Id.* The Report goes on to state that "[t]his 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." *Id.* Thus, Congress did not express an intent to expand the definition of conviction

except in this narrow class of deferred adjudication dispositions. Congress certainly did not intend to expand the conviction definition to vacated convictions.

Notwithstanding this absence of a clear statement in the statute and legislative history, in *Matter of Pickering*, the Board swept vacated convictions into the definition of conviction without congressional authorization. *See infra* Section II.B.4. In so doing, *Matter of Pickering* contravenes the Board and courts' long history of deferring to state criminal dispositions and Congress's intent to carefully circumscribe its definition of conviction.

3. The prior-construction canon forecloses *Matter of Pickering's* interpretation of convictions.

Congress was aware of this decades-long jurisprudence when it defined convictions in the INA. Under the prior-construction canon of interpretation, "[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 and immigration adjudicators adhere to the decades-long practice of deferring to states to give meaning to convictions.

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 ("AEDPA"), to determine whether AEDPA bars an evidentiary hearing where the petitioner did not develop the factual basis of her claims in state court proceedings despite diligent efforts. *Williams*, 529 U.S. at 430. In holding that it does not, the Court emphasized that Congress's chosen language in § 2254(e)(2) "echoes" the language in a prior Supreme Court decision, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992). *Williams*, 529 U.S. at 433. In *Keeney*, the Court considered a prisoner's "failure to develop material facts 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. at 8. Applying the prior-construction canon, the *Williams* Court concluded that, because § 2254(e)(2) mirrored the language of *Keeney*, "Congress intended to preserve at least" that aspect of *Keeney*'s holding. *Williams*, 529 U.S. at 433. The Court interpreted "failed to develop" accordingly. *Id.*

So too here. In setting forth the definition of a conviction in the INA in 1996, Congress adopted verbatim the first two prongs of *Matter of Ozkok*'s three-part test. *See supra* Section II.B.2.ii. In so doing, Congress demonstrated its intent to preserve at least one aspect of the decades-long meaning of conviction in the pre-1998 era: deference to states' own categorization of their criminal dispositions, including for vacated convictions. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530–31 (1998) (holding that, where statutory text is "taken

virtually verbatim" from judicial precedent, Congress intended to codify such precedent).

Indeed, Congress's decision to omit only *Matter of Ozkok*'s third prong, which addressed deferred adjudications, and the legislative history surrounding this decision, demonstrate that Congress diverged from decades-long jurisprudence only in the narrow circumstance of deferred adjudications. As the Conference Report reveals, Congress believed that *Matter of Ozkok* "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." Conf. Rep. at 223–24 (emphasis added). Thus, "[t]his 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." *Id.*

"[T]here is no basis in the text" of § 1101(a)(48)(A) "to believe that Congress" understood conviction to include vacaturs. *Williams*, 529 U.S. at 433. Instead, the prior-construction canon dictates that the previous regime of deference to state dispositions, including for vacated convictions, remains in effect.

4. The federalism canon forecloses *Matter of Pickering's* inclusion of vacated convictions in the conviction definition.

The Constitution reserves any powers not specifically enumerated to the federal government for the states. *See* U.S. Const. amend. X, § 8. These state police powers are "deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000). States' police powers must not be disturbed without an "unmistakably clear" statement of intent from Congress. *Gregory v. Ashcroft*, 501 U.S. 452, 452 (1991).

Matter of Pickering's inclusion of vacaturs in the conviction definition dramatically infringes on a quintessential state police power: the states' inherent sovereignty over their criminal laws. Because Congress did not clearly state its intention to alter this balance of federal and state power, *Matter of Pickering* violates federalism norms and, therefore, this Court should overturn *Matter of Pickering*.

i. Vacating state convictions falls squarely within the states' constitutional police powers over their criminal laws.

It is axiomatic that states are sovereign with respect to the enforcement of their own criminal laws. *Heath v. Alabama*, 474 U.S. 82, 89 (1985). Inherent in states' sovereignty over their criminal laws is the power, as the Supreme Court has repeatedly recognized, "to determine what shall be an offense against its authority

and to punish such offenses." *Id.*; *see also United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law.") (internal quotation marks and citation omitted). The authority to define offenses and convictions under state law are essential state functions that do not fall within any enumerated Congressional power and therefore are "legislative power[s] . . . reserved for the States, as the Tenth Amendment confirms." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018); *see also Hayden v. Pataki*, 449 F.3d 305, 327 (2d Cir. 2006) ("It is undisputed that '[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law.' The Supreme Court has acknowledged and restated on numerous occasions 'the States' sovereign power to punish offenders.'") (internal citations omitted).

Accordingly, the regulation of punishment for state convictions is squarely within the states' police powers. By continuing to treat a vacated disposition as a conviction and by attaching serious consequences to that determination, *Matter of Pickering* impermissibly overrides states' police power over criminal convictions rendered through their court systems.[7]

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[7] *Matter of Pickering* similarly frustrates rehabilitative initiatives undertaken by states to remove post-conviction barriers to employment, another state police power. *See Concerned Home Care Providers Inc. v. Cuomo*, 783 F.3d 77, 85 (2d Cir. 2015) ("States have traditionally possessed broad authority under their police

ii. *Matter of Pickering* violates the federalism canon where Congress did not clearly state an intent to infringe on states' police powers over criminal laws.

While Congress is not foreclosed from regulating in an area of traditional state concern, its ability to do so "is an extraordinary power in a federalist system," one that courts "must assume Congress does not exercise lightly." *Gregory*, 501 U.S. at 460. States' police power over their traditional domains—like criminal law—may not be disturbed absent an "unmistakably clear" statement of intent from Congress. *Id.* at 467; *see also Hayden*, 449 F.3d at 325 ("[W]hen a particular construction of a statute would alter the federal balance, to the extent there is any doubt about whether Congress intended that construction, courts should assume that Congress did not mean to alter the federal balance."). "[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). Because Congress did not expressly state its

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powers to regulate the employment relationship, and the substantive labor standards that they enact set a baseline for employment negotiations.") (internal quotation marks and citation omitted). States establish rehabilitative initiatives like expungement laws, post-sentencing modifications, and vacaturs in part to regulate employment by removing barriers to employment like convictions. *See, e.g.*, Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. Cal. Interdisc. L.J. 395, 397–98 (2016) (explaining how criminal history is a barrier to employment). By interpreting at least some vacaturs as convictions, *Matter of Pickering* improperly treads on another traditional state police power.

intention in the INA to shift the balance as to states' power to define convictions, § 1101(a)(48)(A) must be interpreted, as it had been for decades, with deference to the states' traditional police power.

In *Gregory*, the Supreme Court upheld a Missouri law setting the mandatory retirement age for state judges despite a challenge under the federal Age Discrimination in Employment Act. 501 U.S. at 455–56. The Court found that state judges were not covered employees under the federal law because there was no plain statement that Congress had intended the federal law to apply to the state judiciary, an area "of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460.

So too here. The INA's definition of conviction under § 1101(a)(48)(A) implicates the fundamental realm of state sovereignty over their own criminal laws. Yet, it does not clearly include—or even mention—vacated or otherwise modified prior dispositions. *See Gregory*, 501 U.S. at 467 (outlining clear statement doctrine); *see also Steel Inst. of N.Y. v. New York*, 716 F.3d 31, 36 (2d Cir. 2013) ("There is a strong presumption against preemption when states and localities 'exercise[] their police powers to protect the health and safety of their citizens.'") (citing *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475, 484–85 (1996)); *Project Release v. Prevost*, 722 F.2d 960, 971 (2d Cir. 1983) (considering the state's "police power interest in preventing violence and maintaining order"). Such

silence hardly constitutes an "unmistakably clear" statement of intent to encroach on state police powers.

Indeed, in situations outside of deferred adjudications of guilt, the INA defines "conviction" as "a formal judgment of guilt of the [noncitizen] entered by a court." 8 U.S.C. § 1101(a)(48)(A). A vacated conviction is not a formal judgment of guilt—rather, it is a formal decision to throw out a judgment of guilt because it is no longer valid. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950) (explaining that motions to vacate are "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."). Based on the statutory text, it is evident that Congress did not intend to include vacated convictions. The legislative history similarly signals no intent to include vacated convictions in the INA conviction definition. *See supra* Section II.B.2.ii.

The absence of a clear statement in § 1101(a)(48)(A) concerning vacated convictions is all the more telling given the presence of clear statements elsewhere in the U.S. Code. For example, the Medicare and Medicaid Patient and Program Protection Act of 1987, which excludes individuals and entities with certain convictions from health care programs, defines "conviction" as "a judgment of conviction . . . entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending *or whether the judgment of*

conviction or other record relating to criminal conduct has been expunged." 42 U.S.C. § 1320a-7(i)(1) (emphasis added). Given the absence of a clear statement, "conviction" must be interpreted to exclude prior convictions that have been vacated to avoid intruding on the fundamental state function of defining crimes and punishment. *See New York SMSA Ltd. v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) ("Traditionally, there has been a presumption against preemption with respect to areas where states have historically exercised their police powers.").[8]

Congress's plenary power over immigration does not alter the analysis and is insufficient to overcome the absence of a clear statement of congressional intent to abrogate the states' police powers or to weaken the states' authority over the criminal laws they administer. The Supreme Court has applied the federalism canon in areas such as bankruptcy, a congressional power specifically enumerated in the Constitution. *See* U.S. Const. art. I, § 8, cl. 4; *see also BFP v. Resol. Trust Corp.*, 511 U.S. 531, 533, 543, 545 n.8 (1994) (acknowledging that Congress "has the power pursuant to its constitutional grant of authority over bankruptcy to disrupt [state] . . . foreclosure law," but emphasizing states' "essential sovereign

[8] To the extent this Court held in *United States v. Campbell*, 167 F.3d 94, 97–98 (2d Cir. 1999) that, for purposes of 8 U.S.C. § 1326(a) sentencing enhancements, the conviction definition includes certain vacated state convictions, that case should not apply here. *Campbell* failed to consider the grave federalism concerns which result from its holding. *See supra* Section II.B.4.

interest in the security and stability of title to land" to ultimately find that the state law governed). This Court also has held that "Congress did not intend for bankruptcy laws to abrogate the States' police powers." *In re Berry Estates, Inc.*, 812 F.2d 67, 71 (2d Cir. 1987). This is true of immigration law as well. The weight of the federalism canon is not diminished simply because the federal statute at issue regulates a matter over which Congress has constitutional authority.

Due respect for "background principles of our federal system" under federalism principles requires reviewing courts to ensure that Congress affirmatively intended "to regulate areas traditionally supervised by the States' police power" before interpreting a federal statute to accomplish that result. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006). Given the absence of such evidence in the text of § 1101(a)(48)(A), this Court should reverse *Matter of Pickering* and give full, intended effect to convictions vacated by states.

5. To the extent this Court finds there is ambiguity in the conviction definition, such ambiguity must resolve in favor of noncitizens under the rule of lenity.

To the extent the Court finds any remaining ambiguity after considering § 1101(a)(48)(A)'s plain meaning and applying the above-mentioned canons of interpretation, the rule of lenity forecloses *Matter of Pickering*'s inclusion of vacated convictions. The rule of lenity provides that, where Congress has not "plainly and unmistakably" spoken to the issue at hand, any statutory ambiguity

must be resolved in favor of the defendant. *Bass*, 404 U.S. at 348–49 (citation omitted). The rule of lenity is based on the principles that defendants are entitled to "fair warning" regarding what the law will do, and that, where criminal consequences are particularly severe, the legislature must have spoken clearly to the issue. *Id.*

The rule applies here because the INA attaches criminal penalties to prior criminal convictions, *see, e.g.*, 8 U.S.C. §§ 1324c(e)(2), 1326(b), 1327, and the definition of conviction applies to the entire act, *see* 8 U.S.C. § 1101(a); *supra* Section II.A.2. *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (holding that, within the immigration context, the rule of lenity operates as "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]"); *cf. Mendez v. Barr*, 960 F.3d 80, 87 (2d Cir. 2020) (applying the rule of lenity in an analysis of what constitutes a CIMT under the INA).

The text of § 1101(a)(48)(A), as understood through its plain language and application of appropriate statutory interpretation principles, does not state or sufficiently indicate congressional intent to expand the statutory definition of "conviction" to prior dispositions that have been vacated. *See supra* Section II.B.1–4. Indeed, neither the text of the statute nor its legislative history mentions vacaturs, decades-long common law jurisprudence recognized vacated convictions,

and federalism principles presume federal respect for state criminal law determinations absent a clear congressional directive, absent here. But should this Court continue to find the statute ambiguous on this question, the rule of lenity resolves the ambiguity to conclude that the conviction definition does not include prior convictions that have been vacated.

C. If The Court Determines That *Chevron* Applies, The Agency's Interpretation Is Nonetheless Owed No Deference Because It Is Unreasonable.

Finally, even if this Court finds that the Board ought to receive *Chevron* deference despite § 1101(a)(48)(A)'s dual application status, the Board's decision and reasoning in *Matter of Pickering* violates the Administrative Procedure Act ("APA"), and is thus unreasonable at *Chevron* step two. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) ("[U]nder *Chevron* step two, we ask whether an agency interpretation is arbitrary and capricious in substance.") (internal quotation marks and citation omitted). Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The BIA abuses its discretion when its decision "provides no rational explanation," "inexplicably departs from established policies," "is devoid of any reasoning," or "contains only summary or conclusory statements." *Zheng v. U.S. DOJ*, 409 F.3d 43, 45 (2d Cir. 2005) (citation omitted). Courts "must assess, among other matters, whether the

decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement." *Judulang*, 565 U.S. at 53 (internal quotation marks and citation omitted).

Matter of Pickering violates the APA, and accordingly must be overturned, because it failed to consider multiple relevant, determinative factors in deciding the full reach of the statutory term conviction. In *Matter of Pickering*, the Board created an extrastatutory category of prior convictions that have been vacated due to "procedural or substantive defect[s]" in the underlying criminal proceedings. *See* 23 I. & N. Dec. at 621. If a conviction was vacated on a different basis, the Board continues to consider it a conviction under § 1101(a)(48)(A). The Board failed to consider or address the states' constitutional police powers or the federalism canon, the full history of decisional law interpreting the term conviction, or the rule of lenity in resolving any statutory ambiguities. *See supra* Section II.B. Its failure to engage with these interpretive canons, which are required to accurately identify Congress's intended meaning, renders *Matter of Pickering* unreasonable. Moreover, *Matter of Pickering* unreasonably fails to engage with *Gregory*'s command that states retain their police powers absent a clear statement of congressional intent to usurp those powers—which is lacking here. *See supra* Section II.B.4. As such, *Matter of Pickering* violates the APA and is unreasonable.

This Court is not bound by the prior panel's decision in *Saleh* regarding *Chevron* deference, as it similarly failed to grapple with these interpretative canons. *See* 495 F.3d 17; *see also supra* at 11–12. Moreover, *Saleh* is not binding because the Supreme Court's intervening decision, *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461, 1475 (2018), undercuts *Saleh*'s reasoning. *See Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016) (stating that a prior panel decision does not apply where an intervening Supreme Court decision undermines the panel's reasoning, even if the decisions do not address the precise same issue). In *Murphy*, the Supreme Court held that a federal law prohibiting state laws authorizing sports gambling schemes improperly commandeered state powers. *See* 138 S. Ct. at 1469–73. In so holding, the Supreme Court focused on the balance between federal and state powers. *Id.* at 1475–77. By failing to engage with that balance of powers, the *Saleh* panel's reasoning cannot stand and its deference to the Board's interpretation of the conviction definition is not binding.

The Board's decision in *Matter of Pickering* violates the APA by failing to consider multiple relevant factors in identifying statutory meaning, drawing instead an erroneous and ahistorical legal conclusion. If this Court reviews construction of the conviction definition under the *Chevron* framework—which *amici* respectfully

submit would be incorrect—this Court should overturn *Pickering* as unreasonable at *Chevron* step two.

III. CONCLUSION

For the foregoing reasons, *Amici Curiae* urge this Court to reject the BIA's incorrect interpretation of the conviction definition and remand Mr. Siriboe's case.

DATED: January 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rules 32.1 and 29.1(c) because it contains 6,991 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f), which is fewer than half of the 14,000-word limit for principal briefs. 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 SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate ACMS system on January 4, 2022. Participants in the case who are registered ACMS users will be served by the appellate ACMS system. I further certify that any party or counsel who are not registered ACMS users will be served a copy of the foregoing document by First-Class Mail, postage prepaid.

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