No. 14-72003
PRO BONO

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELY MARINELARENA
(A095-731-273),
Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General,
Respondent.

On Petition For En Banc Review Of A
Decision Of The Board Of Immigration Appeals

BRIEF OF IMMIGRATION LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

PETITIONER IS NOT DETAINED

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INTEREST OF AMICI CURIAE[1]

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Amici curiae are immigration law scholars who teach at institutions of higher education. They have produced extensive scholarship concerning numerous aspects of immigration law, including its intersections with criminal and constitutional law. Their constitutional law expertise concerns questions of federalism. Many amici curiae have also represented noncitizens with criminal convictions in their immigration proceedings and therefore have experience concerning the practical application of immigration law. They submit this brief to explain why the statutory term "conviction" in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(48), should exclude convictions that have been expunged under state law.

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[1] Amici curiae file this brief in accordance with this Court's May 7, 2018 order. All parties consented to its filing. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. A list of amici affiliations is in the appendix.

PRELIMINARY STATEMENT

The INA attaches immigration and criminal consequences to various categories of criminal convictions. The statute's definition of "conviction," however, says nothing about whether expunged convictions will still trigger these consequences. *See* 8 U.S.C. § 1101(a)(48)(A). Attaching federal immigration consequences to criminal convictions that have been expunged under state law violates fundamental principles of federalism. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The state's sovereign authority is at its peak when administering the state's own criminal laws and regulating criminal activity within its own borders. Within our federalist structure of democracy -- designed to foster "innovation and experimentation in government," *id.* at 458 -- every state plus the District of Columbia has adopted some mechanism to alleviate the consequences of criminal convictions, including by eliminating those convictions outright.[2] These state policies represent considered judgments as to the rights and obligations of community membership -- essential state prerogatives.

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[2] *See 50-State Comparison Judicial Expungement, Sealing, and Set-Aside*, Restoration of Rights Project, http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/ (last visited June 29, 2018) [hereinafter "*50-State Comparison*"].

The Board of Immigration Appeals' ("BIA") interpretation of the INA results in the deportation of individuals whose state convictions have been expunged under state law -- and permanently removed from their records -- and therefore undermines this sovereign state interest. Courts that have deferred to the BIA's construction of § 1101(a)(48)(A), under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), have done so in spite of congressional silence on this point and without squarely considering the federalism implications of doing so. Accordingly, these courts have failed to abide by a key tenet of statutory interpretation: courts may only read a statute "to alter the usual constitutional balance between the States and the Federal Government" if Congress has made its intent to do so "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (internal quotation marks omitted).

While Congress' authority over immigration is not in doubt, the INA's definition of conviction evinces no intent to intrude upon a state function as fundamental as the administration of its own criminal laws. The text of § 1101(a)(48)(A) "is far too small a mousehole to hide an elephant of such proportions." *Gale v. First Franklin Loan Servs.*, 701 F.3d 1240, 1242 (9th Cir. 2012) (internal quotation marks omitted). This Court should grant the petition for review and hold that convictions that have been expunged under state law do not

constitute "convictions" within the meaning of § 1101(a)(48)(A). In so doing, this Court should overrule Ninth Circuit panel decisions to the contrary.

ARGUMENT

I. THE INTERPRETATION OF THE STATUTORY TERM "CONVICTION" TO INCLUDE EXPUNGEMENTS DEPARTED FROM DECADES OF SETTLED PRACTICE

The inclusion of expungements within the INA's "conviction" definition is a relatively recent development: "For most of the twentieth century, a non-citizen was generally not subject to removal on the basis of a criminal conviction which had been expunged by the state that rendered the conviction." James A.R. Nafziger & Michael Yimesgen, *The Effect of Expungement on Removability of Non-Citizens*, 36 U. Mich. J.L. Reform 915, 915 (2003). However, in 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which amended the INA to include a broader definition of "conviction" that encompassed deferred adjudications of guilt. Since then, the BIA and some courts have come to a novel conclusion: a noncitizen may be removed from this country if they have been convicted of certain crimes, even if the state that prosecuted him or her has expunged the conviction. As this section explains, that conclusion -- far from an inevitable one based on the statute's text and legislative history -- represents a profound and unwarranted departure from decades of settled practice.

A. Pre-1996: The BIA And The Courts Respect State Expungement Laws

Prior to 1996, the INA attached various consequences to criminal convictions, but left the term "conviction" undefined. In the absence of a statutory definition, "[e]arly case law . . . focused on whether a state action was sufficiently final to be a conviction for immigration purposes." Philip L. Torrey, *Principles of Federalism and Convictions for Immigration Purposes*, 36 Immigr. & Nat'lity L. Rev. 3, 9 (2016). "It was determined that an expungement, considered to be equivalent to a pardon, nullified the conviction, which would therefore not support a deportation order." *Matter of Luviano-Rodriguez*, 21 I. & N. Dec. 235, 243 (BIA 1996) (en banc), *rev'd on other grounds*, 23 I. & N. Dec. 718 (Atty. Gen. 2005).

For example, in *Matter of F-----*, 1 I. & N. Dec. 343, 348 (BIA 1942), the BIA held that a conviction that had been expunged under the same California statute at issue in this case, Cal. Penal Code § 1203.4, did not qualify as a conviction for removal purposes. Because a guilty finding could be set aside under the statute upon completion of probation, the conviction was not "complete and solid" and accordingly was insufficiently final to support a removal order. *Id*. Several years later, the Supreme Court reached a similar conclusion with regard to a Massachusetts statute permitting a criminal conviction to be placed "on file" -- that is, permitting a finding of guilt to be shelved indefinitely, and the imposition of a sentence to be suspended, until either the prosecution or the defendant

requested that the case be reopened. *Pino v. Nicolls*, 215 F.2d 237, 241 (1st Cir. 1954), *rev'd sub nom. Pino v. Landon*, 349 U.S. 901 (1955). In a per curiam opinion, the Supreme Court stated simply: "On the record here we are unable to say that the conviction has attained such finality as to support an order of deportation." *Pino*, 349 U.S. at 901.

Over the years, the BIA, "[i]n keeping with the opinions of the Supreme Court and the Attorney General, . . . attempted . . . to reconcile its definition of a final conviction with the evolving criminal procedures created by the various states." *Matter of Ozkok*, 19 I. & N. Dec. 546, 550 (BIA 1988). That effort culminated in the BIA's adoption, in *Ozkok*, of a multi-pronged test to harmonize the body of law concerning when a deferred adjudication satisfied the definition of conviction. Under the *Ozkok* test, an individual would be considered "convicted" for the purpose of federal immigration law (a) "if the court has adjudicated him guilty or has entered a formal judgment of guilt," or (b) if an adjudication of guilt has been withheld, the following elements were present:

> (1) a judge or jury has found the alien 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. The BIA, however, made clear that "a conviction for a crime involving moral turpitude may not support an order of deportation if it has been expunged." *Id.* at 552. Following *Ozkok*, a panel of the Ninth Circuit affirmed that a noncitizen would not be removed if his or her conviction had been "expunged under the [Federal First Offender Act, 18 U.S.C. § 3607] or a state counterpart to that act."[3] *Garberding v. I.N.S.*, 30 F.3d 1187, 1189 (9th Cir. 1994), *overruled by Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc).

In the decades leading up to 1996, then, both the BIA and the courts gave preclusive effect to state decisions about expungement when contemplating immigration consequences of criminal conduct, and the considered judgments as to the mitigation of punishment that those decisions embraced.

B. Post-1996: The BIA And The Courts Prioritize Removal

With the passage of IIRIRA in 1996, Congress amended the INA and codified the definition of conviction for the first time. According to that definition,

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where --
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

[3] Pursuant to an exception imposed by the Attorney General, however, a conviction of a narcotics violation was to be considered final regardless of the possibility of expungement. *Ozkok*, 19 I. & N. Dec. at 552.

> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48)(A). This definition thus tracks the deferred adjudication test set forth in *Ozkok*, but omits the test's third prong.

IIRIRA's legislative history suggests that Congress' only goal in enacting the statutory definition of conviction was to narrow *Ozkok*'s test with regard to deferred adjudications. As the Joint Explanatory Statement of the Committee of Conference explained, Congress was concerned with "[s]tates [where] adjudication may be 'deferred' upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien's guilt or innocence." H.R. Rep. No. 104-828, at 224 (1996) (Conf. Rep.). In those states, Congress believed that *Ozkok* did "not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the alien's future good behavior." *Id.* The amendment, "by removing the third prong of Ozkok, clarifie[d] 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.* That Congress explicitly referenced one part of the *Ozkok* ruling (its test for deferred adjudications) while saying nothing about another (its continued exclusion of expungements) is compelling evidence that

Congress did *not* intend to alter the longstanding rule that expungements are not "convictions" under the INA.[4]

Notwithstanding this legislative history, the BIA did an about-face three years after IIRIRA's passage, interpreting the statute to change the rule on the effect of expungements. In *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 523 (BIA 1999) (en banc), the BIA held that, after IIRIRA, "an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure."[5] Deference to the BIA's

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[4] *See Nunez-Reyes*, 646 F.3d at 711 (Pregerson, J., dissenting) ("[I]n enacting the 1996 amendment, it appears that Congress . . . had no intention of altering the longstanding rule that convictions that are subsequently expunged under either federal or state law no longer have any effect for immigration purposes." (Internal quotation marks omitted)); *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 531-32 (BIA 1999) (en banc) (Villageliu, Board Member, concurring in part and dissenting in part) ("It is compelling . . . that the limited congressional history before us 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.").

[5] The BIA's removal order in *Roldan-Santoyo* was vacated by this Court in *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728, 749-50 (9th Cir. 2000), which held, as a matter of constitutional law, that the INA's definition of "conviction" did not include instances where "an offense that could have been tried under the [Federal First Offender] Act, [18 U.S.C. § 3607,] but is instead prosecuted under state law, where the findings are expunged pursuant to a state rehabilitative statute." *Lujan-Armendariz* was itself later overruled by this Court, sitting en banc, in *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc), which held that "the

interpretation under *Chevron* led courts to accept this rule, even if they might not have chosen that interpretation in the first instance.[6] For example, this Court, in *Murillo-Espinoza v. I.N.S.*, 261 F.3d 771, 774 (9th Cir. 2001), observed that IIRIRA's conviction definition "said nothing about expungement, and could well be interpreted to establish only *when* a conviction occurred without determining what might be the effect of a later expungement." The Court, however, found that the BIA's interpretation in *Roldan-Santoyo* was "a permissible construction of the statute entitled to deference under *Chevron*." *Id.* (internal quotation marks omitted).

Thus, *Roldan-Santoyo* marked a key turning point, as the BIA broke with decades of settled practice by disregarding state decisions to remove the continuing effect of a state conviction and reintegrate members of their communities into society. Unfortunately, no federal court to consider this rule has squarely confronted its federalism implications. As the following sections demonstrate, this intrusion into state sovereignty critically "'disrupts the federal

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constitutional guarantee of equal protection does not require treating, for immigration purposes, an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under the [Federal First Offender Act]."

[6] *E.g.*, *Wellington v. Holder*, 623 F.3d 115, 120-21 (2d Cir. 2010); *Resendiz-Alcaraz v. U.S. Atty. Gen.*, 383 F.3d 1262, 1268-69 (11th Cir. 2004); *Murillo-Espinoza v. I.N.S.*, 261 F.3d 771, 774 (9th Cir. 2001).

balance.'" Torrey, *supra* at 26 (quoting *United States v. Windsor*, 570 U.S. 744, 768 (2013)); *see also* Jason A. Cade, *Deporting the Pardoned*, 46 U.C. Davis L. Rev. 355, 406 (2012) (arguing that respect for federalism principles counsels against an interpretation of § 1101(a)(48)(A) that includes convictions expunged under state law).

II. STATE EXPUNGEMENT LAWS ARE WITHIN THE STATE POLICE POWER AND SERVE IMPORTANT STATE INTERESTS

A. The State's Definition Of "Convictions" Of State Law Offenses Falls Within Its Constitutionally Reserved Police Powers

It is axiomatic that the states are sovereign with respect to the enforcement of their own criminal laws: "the principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000) (alteration and internal quotation marks omitted). These generalized state police powers encompass the constitutionally protected authority "to determine what shall be an offense against its authority and to punish such offenses." *Heath v. Alabama*, 474 U.S. 82, 89 (1985); *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 omitted)). Indeed, "[p]erhaps the clearest example of traditional state authority is the punishment of local criminal activity."

Bond v. United States, 134 S. Ct. 2077, 2089 (2014). Accordingly, the delineation of the circumstances under which a "conviction" obtains under a state criminal statute, and the regulation of punishment for such convictions, is squarely within the states' police powers.

States also possess "broad authority under their police powers to regulate the employment relationship to protect workers within the State." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976), *superseded by statute*, Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 588 (2011). In recognition of states' traditional authority in this area, the Supreme Court held in *DeCanas* that a California statute that prohibited employers from hiring unauthorized noncitizens properly regulated the employment relationship and was a valid exercise of states' police powers -- not preempted by the INA. *Id.* at 356-57. As in *DeCanas*, state expungement laws also regulate the employment relationship and workforce participation by removing barriers to employment posed by convictions, thereby reducing unemployment.[7] Higher employment rates, in turn,

[7] *See, e.g.*, Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. Cal. Interdisc. L.J. 395, 397-98 (2016) (discussing criminal history as a barrier to employment and stating that "[n]early three-quarters of all employers have adopted broad bans on the hiring of people with a criminal record").

are associated with both less recidivism and less crime.[8] In this regard, such laws are also firmly within states' "police power to promote public safety," *Am. Civil Liberties Union of Nev. v. Masto*, 670 F.3d 1046, 1061 (9th Cir. 2012), and to develop a "strong economy," *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005) (internal quotation marks omitted).

B. Expungement Laws Represent States' Considered Judgments About The Proper Means Of Reducing Recidivism, Protecting Public Safety, And Increasing Employment

A majority of states across the country have exercised their police power to mitigate the consequences of criminal conduct by enacting statutes providing for the expungement of both misdemeanor and felony convictions.[9] More than just a means of granting clemency on an individual basis, expungement laws are policy tools used by state sovereigns to address a variety of interconnected

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[8] *See, e.g.*, Kristen A. Williams, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 U.C.L.A. L. Rev. 521, 531 (2007) (discussing research showing that employment programs for ex-offenders can reduce recidivism by as much as forty percent); Stephen Raphael & Rudolph Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & Econ. 259, 281 (2001) (finding that drop in national unemployment rate caused declines in certain property crimes nationwide; observing that "policies aimed at improving the employment prospects of workers facing the greatest obstacles can be effective tools for combating crime").

[9] *See 50-State Comparison*, *supra* (listing approximately thirty-one state statutes that treat qualifying individuals as either never having been convicted or allowing those individuals to legally say they have never been convicted).

societal challenges, including recidivism, crime, and unemployment. As the California legislature has recognized, expungement clears the way for "rehabilitated individuals to obtain a decent paying job, qualify for secure and safe housing, or pursue their educational goals."[10] A.B. 1115, Third Reading Bill Analysis, 2017-18 Sess., at 5 (Cal. 2017) [hereinafter "Cal. Bill Analysis"].

Within the Ninth Circuit in particular, a number of states have enacted laws governing expungement to advance these policy goals. For example:

California. Originally enacted in 1909, California's expungement law allows courts to "dismiss the accusations" against an offender, where certain prerequisites have been met. Cal. Penal Code § 1203.4(a)(1). As a result of the dismissal, the offender is "released from all penalties and disabilities resulting from the offense of which he or she has been convicted." *Id.* California has only expanded its expungement regime in recent years, passing legislation in 2017 to "increase opportunity for people with older criminal records." Cal. Bill Analysis at

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[10] California's actions are part and parcel of a broader movement towards criminal justice reform in states nationwide. For instance, Arkansas, Hawaii, Louisiana, Michigan, and Montana adopted various sentencing reforms aimed at expanding access to probation and parole in place of incarceration. *See Top Trends in State Criminal Justice Reform, 2017*, The Sentencing Project, https://www.sentencingproject.org/publications/top-trends-state-criminal-justice-reform-2017/ (last visited June 29, 2018). New York and North Carolina raised the age limit of their juvenile justice systems from seventeen to eighteen. *Id.* Arkansas, Louisiana, Maryland, and North Dakota expanded access to public assistance for individuals with felony drug convictions. *Id.*

5; *see* Cal. Penal Code § 1203.42(a). As the legislative history explains, the new statute is intended to "help further reduce recidivism, building upon statewide efforts to assist those who have served their time and proven their willingness to be productive, contributing, law-abiding members of society." A.B. 1115, Comm. on Pub. Safety, 2017-18 Sess., at 3 (Cal. 2017).

Hawaii. Hawaii permits first- or second-time drug-related offenders to seek expungement of their convictions after completion of a substance-abuse program. Haw. Rev. Stat. § 706-622.5(4). In enacting this program in 2002, "[t]he legislature intended to . . . [serve] the best interests of the individual and the community at large" and to "produce a reduction in crime and recidivism." *Id.* cmt. para. 1.

Montana. In 2017, Montana's legislature approved a statute providing for the expungement of misdemeanor convictions. Mont. Code Ann. § 46-18-1101. Recognizing that a misdemeanor record "affects your family, your job, . . . your whole life," the legislature made it easier for ex-offenders to find employment. Jayme Fraser, *Democrat, Republican Want to Allow Some Convicts to Clear Misdemeanor Records*, Helena Indep. Rec. (Jan. 13, 2017), http://helenair.com/news/politics/state/democrat-republican-want-to-allow-some-convicts-to-clear-misdemeanor/article_a757629b-72fb-52bd-9b02-6ce28b852352.html (quoting Senator Nels Swandal). To that end, expunged misdemeanor convictions are

"permanently destroy[ed], delete[d], or erase[d]" from an ex-offender's record. Mont. Code Ann. § 46-18-1101(8)(a).

Washington. Washington's expungement statute also expressly treats individuals whose convictions are expunged as having "never been convicted of that crime."[11] Wash. Rev. Code § 9.94a.640(3). Enacted in 1981, the law explicitly confers this benefit "[f]or all purposes, including responding to questions on employment applications," demonstrating the legislature's intent to expand access to employment opportunities through expungement. *Id.*

As the foregoing examples demonstrate, many state expungement laws are designed to treat convictions as if they never occurred, thereby furthering important state objectives, such as reducing recidivism and crime and increasing employment opportunities. These goals fall squarely within core state authority to regulate employment, prevent crime, and protect public safety, all of which are constitutionally protected state police powers.

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[11] Oregon and Nevada similarly treat individuals whose convictions have been expunged or sealed as "deemed not to have been previously convicted." Or. Rev. Stat. § 137.225(3); *see also* Nev. Rev. Stat. § 179.285(1)(a) (providing that if a record is sealed, "[a]ll proceedings recounted in the record are deemed never to have occurred").

III. IN ACCORDANCE WITH THE FEDERALISM CANON OF STATUTORY INTERPRETATION, THIS COURT SHOULD INTERPRET "CONVICTION" NARROWLY AND HOLD THAT EXPUNGED CONVICTIONS DO NOT SATISFY § 1101(a)(48)(A)

As demonstrated above, the power to define offenses and convictions under state law are essential state functions that do not fall within any enumerated Congressional power. As such, these "legislative power[s are] reserved for the States, as the Tenth Amendment confirms." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). While Congress is not absolutely 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 the Court "must assume Congress does not exercise lightly." *Gregory*, 501 U.S. at 460. The federalism canon of statutory interpretation gives effect to that assumption by requiring that a federal statute speak "unmistakably clear[ly]" to Congress' intent to alter the traditional federal/state balance of power before it will be interpreted to accomplish that result. *Id.*

Section 1101(a)(48)(A) contains no statement -- let alone an unmistakably clear one -- as to Congress' intent to encompass expunged convictions and thereby intrude on a key state power to enforce its own criminal laws. Without any clarifying statement, the scope of § 1101(a)(48)(A) is ambiguous at best. The presence of explicit clarifying statements -- that specifically mention expungements -- in definitions of the term "conviction"

elsewhere in the U.S. Code suggests that Congress did not consider the issue of expungements at all when it drafted § 1101(a)(48)(A). To the extent there is any uncertainty as to the scope of § 1101(a)(48)(A), applying the clear-statement rule of the federalism canon is consistent with the rule of lenity, which resolves statutory ambiguities in favor of noncitizens. The clear-statement rule also "ensure[s] that Congress, rather than an administrative agency, has made the considered and deliberate decision to upset the usual balance of powers in our dual sovereign system." Cade, *supra* at 360 (arguing that the federalism canon of statutory interpretation should apply to constructions of § 1101(a)(48)(A)).

A. Section 1101(a)(48)(A) Lacks An "Unmistakably Clear" Statement Of Intent To Include Expunged Convictions Within The Definition Of Conviction, As Required By The Federalism Canon

As the Supreme Court explained in *Gregory*, because "[c]ongressional interference [in an area of sovereign state interest] would upset the usual constitutional balance of federal and state powers[,] . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." 501 U.S. at 460 (internal quotation marks omitted). Accordingly, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute." *Id.* (emphasis added) (alteration and internal quotation marks omitted). Applying that clear-statement rule of

construction, the Court in *Gregory* held that the federal Age Discrimination in Employment Act did not regulate a state's ability to set a mandatory retirement age for state court judges, since it was "at least ambiguous" whether the statute encompassed those judges. *Id.* at 467. The Court made clear that it was "not looking for a plain statement that judges are excluded," but rather would not read the statute "to cover state judges unless Congress has made it clear that judges are *included*," which Congress had failed to do. *Id.*; *see also Nixon v. Mo. Mun. League*, 541 U.S. 125, 140-41 (2004) (explaining that a federal statute does not "pass *Gregory*" unless it displays an "unequivocal[] . . . commitment" to constrain traditional state authority).

Here, too, it is "at least ambiguous" whether expunged convictions are included within the INA's definition of conviction under § 1101(a)(48)(A). *Gregory*, 501 U.S. at 467. As the Supreme Court has made clear, "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Bond*, 134 S. Ct. at 2090 (applying federalism canon to avoid interpreting federal criminal statute's "expansive language in a way that intrudes on the police power of the States"). Pursuant to federalism principles, it is the states -- not the federal government -- that have authority over administering their own criminal laws and defining when a permanent violation of those laws has occurred. So, as *Gregory* teaches, this Court's task is not to

determine whether expunged convictions are *excluded* from the reach of § 1101(a)(48)(A); rather, the Court may not read the definition to *include* expunged convictions -- which would be a significant intrusion on a state's ability to enforce its own criminal laws -- unless the congressional intent to do so is "unmistakably clear." 501 U.S. at 460, 467.

No such intent is evident here. In situations outside of deferred adjudications of guilt, the INA defines "conviction" simply as "a formal judgment of guilt of the alien entered by a court." 8 U.S.C. § 1101(a)(48)(A). From this definition, there is little indication that Congress considered -- let alone intended -- inclusion of expunged convictions. Although an expunged conviction at one time embodied a "formal judgment of guilt," that judgment has been rendered a legal nullity by the subsequent expungement. Nothing in the statutory text indicates that Congress wanted people to be deported or excluded from the United States on the basis of a state conviction that the state itself has fully voided. *Cf. Pereira v. Sessions*, No. 17-459, 2018 WL 3058276, at *8-9 (U.S. June 21, 2018) (interpreting IIRIRA provision and declining to "'impute to Congress such [a] contradictory and absurd purpose,' particularly where doing so has no basis in the statutory text" (quoting *United States v. Bryan*, 339 U. S. 323, 342 (1950))). The legislative history is similarly silent on this point. *See supra* Part I.B.

The absence of a clear statement in § 1101(a)(48)(A) concerning expunged convictions is all the more telling given the *presence* of a clear statement elsewhere in the U.S. Code;[12] Congress knows how to indicate its intent to override state criminal processes when it chooses to do so. 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). Congress' failure in § 1101(a)(48)(A) to say *anything* about expungements suggests that, at best, it did not consider the issue or its federalism implications. *Cf. United States v. Bass*, 404 U.S. 336, 349 (1971) ("[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."). To the extent that Congress' failure in this regard creates ambiguity, the federalism canon requires this Court to interpret the statute to exclude expunged convictions, so as to avoid intruding on the fundamental state function of defining crimes and punishment.

[12] *Cf. Pereira*, 2018 WL 305827, at *10 n.8 (referring to "similar definitional language" in other provisions of U.S. Code in interpreting provision of IIRIRA).

Indeed, a panel of this Court has already found that § 1101(a)(48)(A) is ambiguous insofar as it "sa[ys] nothing about expungement." *Murillo-Espinoza*, 261 F.3d at 774. In light of that ambiguity, however, the Court in *Murillo-Espinoza* applied *Chevron* deference to the BIA's interpretation of § 1101(a)(48)(A) in *Roldan-Santoyo* to include state rehabilitative expungements. *Id.* That deference -- without even considering the import of the federalism canon -- was misplaced.[13] As the Supreme Court has held, *Chevron* deference is unwarranted "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," in the absence of "a clear indication that Congress intended that result" -- and it is particularly unwarranted "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps*

[13] It is not even clear that *Chevron* deference is appropriate in this context at all, as the interpretation of statutes that concern criminal law is a task reserved exclusively for the judiciary, not the executive branch. *See Nunez-Reyes*, 646 F.3d at 712 (Pregerson, J., dissenting) ("Because construction of [the term "conviction"] has consequences for the administration of criminal law, it is the independent duty of the judiciary, and not the BIA, to assign to the term a meaning." (Citing *Crandon v. United States*, 494 U.S. 152, 177 (1990))); *see generally* Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 Drexel L. Rev. 323 (2017) (arguing that *Chevron* deference is inapplicable in resolving any ambiguity in crime-based removal statutes). As Justice Kennedy recently observed, "reflexive deference [to the BIA] . . . is troubling. And when deference is applied to other questions of statutory interpretation . . . it is more troubling still."). *Pereira*, 2018 WL 3058276, at *14 (Kennedy, J., concurring).

of Eng'rs, 531 U.S. 159, 174 (2001) [hereinafter "*SWANCC*"] (invalidating agency rule that purported to assert federal jurisdiction over abandoned gravel pit, which "would result in a significant impingement of the States' traditional and primary power over land and water use").

Not only did the BIA's decision in *Roldan-Santoyo* alter the federal-state framework, but its approach in doing so was exactly backwards: instead of starting from the assumption that expunged convictions are *excluded* from the federal definition and looking for a clear statement from Congress to the contrary, the BIA assumed that expungements were *included* in the absence of a clear congressional statement otherwise. *Roldan-Santoyo*, 221 I. & N. Dec. at 522. Accordingly, this Court, sitting en banc, should overrule the panel decision in *Murillo-Espinoza*, and its deference to *Roldan-Santoyo*, to the extent that it is inconsistent with the federalism canon's clear-statement rule expressed in *Gregory* and reaffirmed in *SWANCC*.[14]

The force of the clear-statement rule is not lessened simply because the statute in question concerns immigration, a matter over which Congress has primary authority. The Supreme Court has applied the federalism canon in areas such as bankruptcy, a congressional power specifically enumerated in the

[14] This Court should also overrule the panel decision in *Reyes v. Lynch*, 834 F.3d 1104 (9th Cir. 2016), for the same reason.

Constitution. *See* U.S. Const. art. I, § 8, cl. 4.[15] For example, in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 533 (1994), the Court applied the canon in determining whether a foreclosure sale carried out in compliance with state law could nonetheless constitute a fraudulent transfer under the federal bankruptcy code. While the Court acknowledged that Congress "has the power pursuant to its constitutional grant of authority over bankruptcy to disrupt [state] . . . foreclosure law," it emphasized states' "essential sovereign interest in the security and stability of title to land." *Id.* at 543, 545 n.8 (internal citation omitted). In light of that paramount state interest, the Court found that the bankruptcy code's requirement that transfers of property by insolvent debtors be in exchange for "reasonably equivalent value" evinced an insufficiently clear intent to set aside foreclosure sales that were otherwise valid under state law. *Id.* at 544-45. Thus, 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.

Nor is the Supreme Court unaccustomed to applying clear-statement rules in the immigration context. To the contrary, in *DeCanas*, 424 U.S. at 357-58,

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[15] Congress' power over immigration is not explicitly enumerated in the Constitution, but rather is implied from "various sources," including Congress' constitutional authority to establish a "uniform Rule of Naturalization" and to "regulate Commerce with foreign Nations," as well as its "broad authority over foreign affairs." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 972 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1279 (2018) (internal quotation marks omitted).

the Court applied such a rule in holding that the INA did not displace a California statute that barred employers from knowingly employing noncitizens who were not lawfully present in the country. In light of states' "broad authority under their police powers to regulate the employment relationship to protect workers within the State," the Court declined to interpret the INA to "oust state authority to regulate the employment relationship," in the absence of evidence that such ouster was "the clear and manifest purpose of Congress."[16] *Id.* at 356-57; *see also Vartelas v. Holder*, 566 U.S. 257, 266-69 (2012) (declining to apply IIRIRA retroactively in the absence of a clear congressional statement to that effect); *I.N.S. v. St. Cyr*, 533 U.S. 289, 298-99 (2001) (declining to interpret IIRIRA to strip federal courts of jurisdiction to entertain noncitizens' habeas corpus petitions in the absence of "clear statement of congressional intent to repeal habeas jurisdiction").

Ultimately, "a sovereign's right to revoke or restore membership consequences that follow from its own criminal law is distinct. Though the federal government may have the power where noncitizens are concerned to displace or trump the membership decisions that states implement" through the use of expungements, this Court should, consistent with the federalism canon of statutory

[16] Congress subsequently passed the Immigration Reform and Control Act, which contains an express preemption provision barring states from imposing penalties on employers of unauthorized noncitizens. *See* 8 U.S.C. § 1324a(h)(2).

interpretation, "assume that Congress would choose to do so carefully and deliberately." Cade, *supra* at 398. Section 1101(a)(48)(A) does not reflect any such deliberation.

B. Application Of The Federalism Canon's Clear-Statement Rule Is Consistent With The Rule Of Lenity

Applying the federalism canon's clear-statement rule is also consistent with the rule of lenity. Where a statute with criminal implications is susceptible to two different readings, "it is appropriate, before [the Court] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Bass*, 404 U.S. at 347 (resolving statutory ambiguity in favor of defendant on both lenity and federalism grounds). Because the INA attaches criminal penalties to prior criminal convictions, *see, e.g.*, 8 U.S.C. § 1326(b), and the definition of "conviction" applies to the entire act, *see* 8 U.S.C. § 1101(a), the rule of lenity applies here. Criminal law concepts are also instructive when interpreting immigration statutes, because "federal immigration law [has] increasingly hinged deportation orders on prior convictions, [making] removal proceedings . . . ever more intimately related to the criminal process." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (plurality opinion) (internal quotation marks omitted). Further, in the immigration context in particular, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *St. Cyr*, 533 U.S. at 320.

As discussed above, § 1101(a)(48)(A) is at best ambiguous with respect to whether expunged convictions are to be included in the statutory definition. Congress did not speak to the effect of expungement in the text of the statute, and the legislative history does not reflect any consideration of expunged convictions either. Any ambiguity must be resolved in favor of the noncitizen. Such a resolution is warranted "in view of the grave nature of deportation -- a drastic measure, often amounting to lifelong banishment or exile." *Dimaya*, 138 S. Ct. at 1213 (plurality opinion) (internal citations and quotation marks omitted). Indeed, "deportation is a particularly severe penalty," and "preserving [a noncitizen's] right to remain in the United States may be more important to the [noncitizen] than any potential jail sentence." *Padilla v. Kentucky*, 559 U.S. 356, 365, 368 (2010) (internal quotation marks omitted). The INA's conviction definition is not merely a statutory term with federalism implications; rather, the BIA's decision to interpret the definition to allow the use of expunged convictions to deport individuals has significant consequences for real people and their families. In the absence of clear evidence that Congress intended such a draconian result, that interpretation cannot stand.

* * *

Where a constitutionally valid federal law conflicts with a state statute, there is no doubt that the former trumps the latter. The federalism canon of

statutory interpretation does not purport to change this constitutional rule, nor does it question Congress' authority over immigration. But the canon does ensure that Congress affirmatively intended a conflict at all -- here, that it actively considered and intended to override a sovereign state's exercise of its police power to eliminate the continuing effect of a state conviction. Due respect for "background principles of our federal system" requires that courts 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). In the absence of such evidence on the face of § 1101(a)(48)(A), this Court should uphold states' expungement laws against unintended federal intrusion.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Court grant the petition for review.

Dated: June 29, 2018
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Respectfully submitted,

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/s/ Sarah L. Rosenbluth
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CERTIFICATE OF SERVICE

I, Sarah L. Rosenbluth, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 29, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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