Nos. 19-3437 & 20-1591

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Dulce Zaragoza,
Petitioner,

v.

William P. Barr,
Respondent.

Petitions for Review of the Decisions of
the Board of Immigration Appeals
No. A061-636-606

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AMERICAN IMMIGRATION COUNCIL, IMMIGRANT LEGAL RESOURCE CENTER, IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, HARVARD LAW SCHOOL CRIMMIGRATION CLINIC, AND NATIONAL IMMIGRATION LITIGATION ALLIANCE

IN SUPPORT OF PETITIONER

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Dated: August 10, 2020

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3437 / 20-1591

Short Caption: Dulce Zaragoza v. William P. Barr

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Nat'l Immigration Litig. All., Nat'l Immigration Project of the Nat'l Lawyers Guild, Harvard Law Sch. Crimmigration Clinic

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
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(3) If the party, amicus or intervenor is a corporation:

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/Nadia Anguiano-Wehde Date: 8/10/20

Attorney's Printed Name: Nadia Anguiano-Wehde

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

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N/A

Attorney's Signature: s/Benjamin Casper Sanchez Date: 8/10/20

Attorney's Printed Name: Benjamin Casper Sanchez

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

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Attorney's Printed Name: Seiko Shastri

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: s/Andrew Wachtenheim Date: 8/10/20

Attorney's Printed Name: Andrew Wachtenheim

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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INTEREST OF AMICI CURIAE

Amici are organizations of immigration lawyers and legal scholars who have practiced and studied immigration law since before the founding of the modern immigration system in 1952. *Amici* organizations are experts in the history and content of the INA and its predecessor legislation, the decades of decisional law regulating the immigration system and interpreting the INA, the expansion of the INA's criminal illegal reentry provisions that are among the legislation's provisions that give it criminal in addition to civil application, and the administrative law principles that dictate federal court review over agency action in immigration cases. Detailed interest statements for each organization are included in the addendum to this brief.

STATEMENT OF COMPLIANCE WITH RULE 29

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

SUMMARY OF THE ARGUMENT

In *Matter of Thomas and Matter of Thompson,* 27 I. & N. Dec. 674 (AG 2019) (*Thomas/Thompson*), Attorney General ("AG") Barr upended rules that had reliably governed the interplay between federal immigration law and state criminal sentencing laws for as long as the Immigration and Nationality Act (INA) had been on the books. *Thomas/Thompson* violates congressional intent, is due no deference in this Court, and should be rejected. Alternatively, and at a minimum, this Court should bar the agency from applying *Thomas/Thompson* retroactively.

For decades prior to the major 1996 amendments to the INA, immigration agencies and federal courts acknowledged that a state court sentence modification must be given legal effect for immigration purposes regardless of the criminal court's reasons for that order. In 1996, Congress codified a definition of "sentence" at 8 U.S.C. § 1101(a)(48)(B) that did nothing to alter this legal rule, effectively baking it further into law, a reality recognized by the Board of Immigration Appeals in multiple precedents. *Matter of Cota-Vargas*, 23 I. & N. Dec. 849 (BIA 2005).

Thomas/Thompson ignores the text of the INA and this history, violating the clear congressional evident 8 U.S.C. § 1101(a)(48)(B). The AG's decision is unreasoned and is due no deference because it imposes new immigration consequences on modified sentences and dramatically inflates criminal sentencing exposure to noncitizens. This action is antithetical to some of this Nation's most cherished principles of constitutional and administrative law: the "constitutional balance between the States and the Federal Government," *Gregory v. Ashcroft*, 501

U.S. 452, 460 (1991), and separation of powers, *see Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting). A proper, results-neutral reading of § 1101(a)(48)(B) yields the incontrovertible conclusion that Congress accepts sentencing modifications for immigration purposes regardless of whether the overt reason for the modification was legal defect in initial sentencing. For these and other reasons, the decision must be struck down.

Alternatively, and at a minimum *Amici* discuss why this Court's precedent *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014) must bar retroactive application of *Thomas/Thompson* to individuals like Ms. Zaragoza who received sentencing modifications when the correct legal standard was in place.

ARGUMENT

I. *Thomas/Thompson*'s Reinterpretation of 8 U.S.C. § 1101(a)(48)(B) Is Owed No Deference and Should be Rejected by This Court

A. Historical background

Dating nearly to the inception of the INA, immigration law recognized the fundamental distinction between state criminal convictions and sentences, *Matter of C-P-*, 8 I. & N. Dec. 504, 506–08 (BIA 1959), and accepted "at face value . . . a judgment regularly granted by a competent [state] court, unless a fatal defect [was] evident upon the judgment's face," *Matter of F-*, 8 I. & N. Dec. 251, 253 (BIA 1959); *see also In re Cota-Vargas*, 2006 WL 2008266, at *2–6 (BIA 2006) (reiterating that the agency has long reaffirmed the necessity of giving full faith and credit to state court judgments and has long recognized state court judgments modifying sentences

without inquiring as to the reasons underlying the resentencing). This distinction, and the crediting of state court judgments, is important—and necessary—because Congress has decided that certain immigration consequences must flow from convictions for certain crimes without regard to the sentence imposed, while other consequences will result only if the conviction is accompanied by a sentence (or potential sentence) of a particular length. *Compare* 8 U.S.C. §§ 1101(a)(43)(A), 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i), *and* 1227(a)(2)(C), *with* 8 U.S.C. §§ 1101(a)(43)(G), 1182(a)(2)(B), *and* 1227(a)(2)(A)(i). Because of the established distinction between "convictions" and "sentences," and the monumental consequences flowing from each, federal courts and the agency historically kept these terms analytically distinct and developed separate bodies of law to address them.

Against the backdrop of this history, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress for the first time provided statutory definitions of the terms "conviction" and "sentence" for the purposes of immigration law. Pub. L. No. 104-208, § 322, 110 Stat. 3009 (1996); *see* Pet'r Br., 34–35 & n.2. Before IIRIRA, the Board of Immigration Appeals ("BIA") had developed a rule consisting of three criteria to define a "conviction" for immigration law purposes. *See Matter of Ozkok*, 19 I. & N. Dec. 546, 551–52 (BIA 1988). When Congress added a definition of "conviction" to the INA at 8 U.S.C. § 1101(a)(48)(A), it did so specifically to supersede that three-part definition and "used, almost verbatim, the first two parts of the *Ozkok* test" but omitted the third.

Pinho v. Gonzales, 432 F.3d 193, 205 (3d Cir. 2005). Per the text and legislative history of § 1101(a)(48)(A), the singular purpose of the codification was to extend the definition of "conviction" to encompass "deferred adjudications"—that is, to treat as convictions those dispositions where adjudication of guilt was deferred until satisfactory completion of probation. *See* Pet'r Br., 34–35; H.R. CONF. REP. NO. 104-828, at 224 (1996) (Conf. Rep.); *see also, e.g.*, *Herrera-Inirio v. INS*, 208 F.3d 299, 305–06 (1st Cir. 2000). Otherwise, Congress had clear, demonstrable intent to maintain the conviction definition announced in *Ozkok*.

Following the 1996 amendments, federal courts and the BIA examined the effect that state court orders vacating convictions had for purposes of immigration law. In one of the earliest cases to consider the issue, the First Circuit relied on the plain text of § 1101(a)(48)(A) to hold that vacaturs "other than on the merits or on a basis tied to the violation of a statutory or constitutional right in the underlying criminal case have no bearing in determining whether [a noncitizen] is to be considered 'convicted' under section 1101(a)(48)(A)." *Herrera-Inirio*, 208 F.3d at 305. Although the court based its conclusion on the statutory text, it also explained that the legislative history made "crystal clear" that congressional emphasis on the "*original* admission of guilt" made it "plain[] . . . that a subsequent dismissal of charges, based solely on rehabilitative goals and not on the merits of the charge or on a defect in the underlying criminal proceedings, d[id] not vitiate that original admission." *Id*. at 305–06.

The BIA soon followed suit, expressly relying on *Herrera-Inirio*'s analysis of the statute's text and legislative history. In *Matter of Pickering*, the BIA held that conviction vacaturs would be effective for immigration purposes *only* if they were based on a procedural or substantive defect underlying the original criminal proceedings. 23 I. & N. Dec. 621 (BIA 2003). This Court has since deferred to the BIA's decision in *Pickering*. *Ali v. Ashcroft*, 395 F.3d 722, 728–29 (7th Cir. 2005).

The effect of post-conviction relief on *sentences*, however—both pre- and post-IIRIRA—took a different course, consistent with the longstanding distinction between convictions and sentences. As early as 1959, decades before IIRIRA added a definition of "sentence" to the INA, the BIA gave full effect to all sentence modifications, holding that when a trial court alters or modifies a sentence, the modified sentence controls for immigration purposes. *See C-P-*, 8 I. & N. Dec. at 508; *see also, e.g.*, *Matter of H-*, 9 I. & N. Dec. 380, 383 (BIA 1961). In the 1982 decision *Matter of Martin*, the BIA squarely solidified this rule, holding that when a sentencing court modifies a sentence upon reconsideration, "[t]he new, reduced sentence stands as the only valid and lawful sentence imposed[.]" 18 I. & N. Dec. 226, 227 (BIA 1982). As relevant here, pre-IIRIRA BIA case law additionally established that when a sentencing court had suspended the imposition of a sentence, no sentence had actually been "imposed" for the purposes of immigration law. *E.g.*, *Matter of Castro*, 19 I. & N. Dec. 692, 697 (BIA 1988).

Against this backdrop relevant to sentences, IIRIRA codified a definition for that term at § 1101(a)(48)(B) and once again did so for a narrow reason: to overrule

BIA case law regarding *suspended* sentences. *See* Pet'r Br., 34 n.2. By stark contrast, however, Congress left wholly undisturbed the BIA's precedent recognizing the necessity of giving full effect to sentence *modifications*. Indeed, the BIA has expressly recognized that precise legislative intent in post-IIRIRA decisions. *Matter of S-S-*, 21 I. & N. Dec. 900, 902 (BIA 1997). Just as steadfastly, the BIA also correctly recognized that IIRIRA did nothing to disturb the settled rule that sentence modifications or alterations—regardless of the reasons that underlie them—must be given effect for immigration law purposes. The BIA's 2001 decision in *Matter of Song* reaffirmed the agency's pre-IIRIRA decision in *Martin* and confirmed the undisturbed rule that a sentence modification must be given full legal effect in immigration proceedings. 23 I. & N. Dec. 173, 174 (BIA 2001) (reaffirming *Martin*, 18 I. & N. Dec. 226).

Importantly, in *Song* as well as in subsequent decisions, the BIA flatly rejected attempts to import case law respecting *conviction vacaturs* into the area of *sentence modifications*. *Song* unequivocally explained that the BIA's precedent "address[ing] only the definition of a 'conviction' contained in section 101(a)(48)(A) of the Act" was wholly inapplicable to questions involving "the definition of a 'term of imprisonment' set forth in section 101(a)(48)(B)." 23 I. & N. Dec. 173, 174 (BIA 2001) (distinguishing *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999), which involved the INA's definition of conviction); *cf. Matter of Devison*, 22 I. & N. Dec. 1362, 1373 (BIA 2000) (noting that "resentencing is distinct from the vacation of a conviction"). Subsequently, in *Matter of Cota-Vargas*, the BIA rejected the textually

unmoored argument that, like convictions, sentence modifications should only be effective if based on a defect in the underlying proceedings. 23 I. & N. Dec. 849, 852 (BIA 2005). The Board held that applying the "*Pickering* rationale to sentence modifications ha[d] no discernible basis in the language" or stated purpose of § 1101(a)(48)(B). *Id.* Denying the government's motion for reconsideration of *Cota-Vargas*, the BIA once again emphasized its reasoning:

> Our long-standing default rule has been that a judgment modifying a criminal sentence, entered by a court of competent jurisdiction, is to be given effect in immigration proceedings. . . . It was this default rule that the Board invoked in *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), and reaffirmed in *Matter of Cota*, *supra*.
>
> Nothing in the language or legislative history of section 101(a)(48)(B) of the Act reflects that Congress intended to supersede the default rule of *Matter of Martin*, [18 I&N Dec. 226 (BIA 1982)], with respect to aliens who had been resentenced.
>
> *In re Cota-Vargas*, 2006 WL 2008266, at *6.[1]

Like the BIA, federal courts similarly rejected the application of the *Pickering* standard to cases involving sentence modifications and vice versa. These courts recognized the well-settled principle that a "state court expungement of a conviction is qualitatively different from a state court order to classify an offense or modify a sentence[,]" *Rumierz v. Gonzales,* 456 F.3d 31, 41 n.11 (1st Cir. 2006) (internal quotation marks omitted), and thus that the "question of whether a 'conviction'

[1] The BIA subsequently issued *Matter of Estrada*, which addressed sentence "clarifications"—not modifications—and held that the BIA must give effect to state court orders clarifying ambiguous sentences. 26 I. & N. Dec. 749 (BIA 2016). *Amici* contend that *Estrada* is wrong as a matter of law insofar as it suggests that certain sentence clarifications will not be given effect. The court need not address that point here to conclude that *Thomas/Thompson* was wrongly decided with respect to Ms. Zaragoza's case.

exists under 8 U.S.C. § 1101(a)(48)(A) is separate from the determination of the length of a sentence, or 'term of imprisonment,' under 8 U.S.C. § 1101(a)(48)(B)[,]" *Boar v. Holder*, 475 F. App'x 615, 620 (6th Cir. 2012).

Departing from decades of BIA precedent giving full effect to *all* sentence modifications—precedent undisturbed by IIRIRA and since reaffirmed by the BIA itself based on the statutory text—the AG inexplicably and abruptly changed course in *Thomas/Thompson* and erroneously transferred the principles of *Pickering* regarding convictions to the realm of sentence modifications. As described below, that decision is plainly contrary to congressional intent reflected in the plain text of the statute, disturbs reasonable reliance by noncitizens, and will impede the consistent, fair, and expeditious administration of the immigration laws. Like Ms. Zaragoza, *Amici* accordingly urge this Court to declare the AG's decision erroneous as a matter of law or to prohibit its retroactive application.

B. *Thomas/Thompson* is owed no deference

Amici respectfully note that § 1101(a)(48)(B) is a statute of dual application that, in addition to triggering the most severe immigration consequences imposed by the INA, also has extensive *criminal* and *detention* applications that ought to place this Court's interpretation of the statute wholly beyond the *Chevron*[2]

[2] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Amici* note that several justices of the U.S. Supreme Court have questioned the ongoing viability of the *Chevron* doctrine. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (calling for reconsideration, "in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision"); *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J.,

framework. The most obvious immigration function that the § 1101(a)(48)(B) definition of "sentence" plays within the INA is in triggering deportability for key "aggravated felony" sub-provisions defined at § 1101(a)(43), each of which applies only where a noncitizen convicted of the relevant substantive "aggravated felony" offense also has a court-ordered sentence "for which the term of imprisonment is at least one year."[3]

At the same time *Thomas/Thompson*'s interpretation of § 1101(a)(48)(B) will expand the number of persons subject to removal under these "aggravated felony" grounds, it will also expand application of related criminal provisions, most notably the federal felony for "illegal reentry" at 8 U.S.C. § 1326. The baseline maximum sentence for a previously removed noncitizen who is convicted of illegal reentry to the United States is two years, 8 U.S.C. § 1326(a), but a noncitizen who was previously removed following a conviction for an aggravated felony offense enumerated at § 1101(a)(43) is subject to a *ten-fold enhancement* of up to 20 years imprisonment under 8 U.S.C. § 1326(b). *See, e.g.*, *United States v. Resendiz-Ponce*, 549 U.S. 102, 105 (2007).[4]

It is notable in this regard that the U.S. Supreme Court has not extended *Chevron* deference to the agency when interpreting the reach of dual-application aggravated felony grounds of removal. *See, e.g.*, *Esquivel-Quintana v. Sessions,* 137

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concurring); *Gutierrez–Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

[3] These key aggravated felony grounds are 8 U.S.C. §§ 1101(a)(43)(F) (crimes of violence), (G) (theft offenses), (R) (commercial bribery, counterfeiting, forgery and related offenses), (S) (obstruction of justice, perjury, and related offenses).

S. Ct. 1562 (2017); *Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *see also Valenzuela Gallardo v. Barr*, No. 18-72593, 2020 WL 4519085, at *5–6 (9th Cir. Aug. 6, 2020) (discussing the Supreme Court's consistent pattern of extending no deference to agency interpretation of dual-application aggravated felony provisions and collecting cases).[5]

Amici contend that the role that § 1101(a)(48)(B)'s definition of "sentence" plays in triggering both aggravated felony grounds of removal[6] and the felony illegal reentry statute should preclude any application of the *Chevron* framework here. The interpretive question Ms. Zaragoza presents has such far-reaching implications for individual liberty and criminal punishment that it should be deemed a major (i.e. legislative) policy question of the sort Congress simply would not leave to an agency to determine at all. *See, e.g.*, *King v. Burwell,* 135 S. Ct. 2480, 2483 (2015). The Court should therefore apply its traditional tools of statutory construction without any deference to the agency.

To any extent this Court determines its review of *Thomas/Thompson* must proceed under the *Chevron* framework, *Amici* respectfully note that the required

[5] *See also*, Michael Kagan, *Chevron's Liberty Exception*, 104 IOWA L. REV. 491, 532–35 (2019) (examining U.S. Supreme Court's practice of reviewing immigration removal statutes that implicate individual liberty rights without application *Chevron*.).

[6] *Thomas/Thompson* will also expand ineligibility to naturalize to U.S. citizenship under 8 C.F.R. § 316.10(b)(1)(ii) and mandatory detention during removal proceedings under 8 U.S.C. § 1226(c). Affected noncitizens may also be placed in expedited removal proceedings under 8 U.S.C. § 1228 with far fewer procedural protections. Donna Lee Elm, Susan R. Klein & Elissa C. Steglich, *Immigration Defense Waivers in Federal Criminal Plea Agreements*, 69 MERCER L. REV. 839 (2018).

step-one analysis regarding statutory ambiguity should never be "reflexive[.]" *Pereira*, 138 S. Ct. at 2025. Rather, a court applying *Chevron* must first independently and rigorously exhaust all the traditional tools of statutory interpretation to determine congressional intent. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citing *Chevron,* 467 U.S. at 843 n.9). In all cases governed by the *Chevron* framework, it is fundamental that the reviewing court must focus its traditional tools of statutory interpretation upon an identified "precise question" in relation to specific statutory text.

Here, the precise statutory question at hand is whether Congress intended its textual definition of the term "sentence" at § 1101(a)(48)(B) to require that immigration adjudicators give legal effect to a criminal court order modifying a sentence, irrespective of the reasons for the modification. Pet'r Br., 32. For the reasons advanced by Ms. Zaragoza, Pet'r Br., 32–38, and as further elaborated below, *Amici* respectfully contend that regardless of the approach to deference this Court may follow, the answer to this precise question can only be "yes."[7]

Amici also believe it is doubtful that Congress did or could have delegated to the AG under the statute defining his powers, 8 U.S.C. § 1103(g), the authority he claims in *Thomas/Thompson*. The statute's language describing the AG's role in

[7] This Court has never addressed the precise question concerning 8 U.S.C. § 1101(a)(48)(B) that Ms. Zaragoza presents, and there was no occasion for this question to reach any court until *Thomas/Thompson*. *Amici* are aware of this Court's prior deference to the BIA's interpretation of 8 U.S.C. § 1101(a)(48)(A), with respect to distinct questions regarding the separate definition of "conviction." *See, e.g.*, *Ali v. Ashcroft,* 395 F.3d 722, 728 (7th Cir. 2005); *Sandoval v. INS*, 240 F.3d 577, 579 (7th Cir. 2001). None of these decisions could bind this Court in its analysis of the distinct question and statutory provision at issue here.

implementing Congress' immigration statute cannot be construed as an intelligible delegation of power authorizing agency officials to determine (and redetermine) who is an aggravated felon subject to automatic removal and who will be subject to a 10-fold sentence enhancement and potential imprisonment of up to 20 years. Here again, the profound criminal and individual liberty implications of the interpretive question Ms. Zaragoza presses should lead this Court to conclude that Congress could not have given it to the agency to decide. *See Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (arguing, in divided 5-3 decision, that Congress' non-specific authorization for the U.S. Attorney General to create and alter rules implementing the federal sex offender registration statute violates the non-delegation doctrine and separation of powers by abdicating to an agency policy choices that impact individual liberty rights, including policies substantially lengthening criminal sentences), *reh'g denied*, 140 S. Ct. 579 (2019); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in denial of certiorari) (noting Justice Gorsuch's dissent in *Gundy* and signaling interest in revisiting the non-delegation doctrine in an appropriate future case).

C. *Thomas/Thompson* contravenes congressional intent

1. Proper application of the traditional tools of statutory construction demonstrates that the definition of "sentence" at § 1101(a)(48)(B) unambiguously gives full legal effect to all sentence modifications

To conclude that the AG's decision in *Thomas/Thompson* is wrong as a matter of law, this Court must start with—and need look no further than—the

statute's plain text. *See Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). Section 1101(a)(48)(B) provides that the term "sentence . . . is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that . . . sentence in whole or in part." Here, the statutory text does not explicitly address the precise issue of whether all sentence modifications must be given full legal effect. Nevertheless, "the statute's silence on the specific subject . . . does not necessarily mean it is ambiguous." *Univ. of Chicago Hosps. v. United States*, 545 F.3d 564, 567 (7th Cir. 2008). Where a statute does not expressly address the issue, courts must employ "the normal tools of statutory interpretation." *See, e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1569; *cf. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("Where, as here, the canons supply an answer, *Chevron* leaves the stage." (quotations omitted)). In this case, the traditional canons of statutory construction demonstrate that § 1101(a)(48)(B) unambiguously gives full legal effect to all sentence modifications.

First, and most importantly, nothing in the text of § 1101(a)(48)(B) indicates that Congress intended for the term "sentence" to be interpreted any differently from how it had been interpreted for decades before the enactment of IIRIRA. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change[.]" *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also, e.g.*, *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) ("[L]ongstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the

practice untouched."). Here, and the BIA recognized in *Cota-Vargas*, Congress adopted a definition of "sentence" against a backdrop of BIA decisional law giving full effect to sentence modifications. Because *nothing* in the statutory language even remotely suggests that Congress sought to overturn that precedent, it is plain that Congress adopted the BIA's long-standing rule that all sentence modifications must be given effect when it codified the definition of sentence at § 1101(a)(48)(B).

In fact, Congress' intent is particularly clear in light of the changes that Congress *did* make to the BIA's prior construction of the term "sentence." The Supreme Court has long explained that the presumption that Congress adopts a particular administrative rule pre-dating a statute when it re-enacts the statute without change is strongest when Congress supersedes or otherwise changes *other* administrative rules that pre-date the statute. *Lorillard*, 434 U.S. at 581–82. Here, , through the plain text of § 1101(a)(48)(B), Congress expressly overruled decades of BIA precedent regarding the suspended imposition or execution of sentences. Accordingly, courts must presume that had Congress intended to overrule additional precedent, it would have done so explicitly.[8] *See, e.g.*, *Cranberry Growers*

[8] In fact, federal courts and the BIA have appropriately applied the *Lorillard* principle to interpret the definition of conviction at § 1101(a)(48)(A). For instance, in *Orabi v. Att'y Gen.*, the Third Circuit held that Congress' definition of "conviction" clearly incorporated the well-established BIA rule respecting the finality of convictions, as nothing in the statutory text indicated an intent to depart from that long-standing rule. 738 F.3d 535, 540 (3d Cir. 2014) (concluding that § 1101(a)(48)(A) "sought to broaden the scope of th[e] term ["conviction"], but in so doing, it did not refer to, amend, change, or even mention doing away with the need for appeal to acquire finality of judgment"). Similarly, in *Matter of Devison*, the BIA concluded that IIRIRA's definition of "conviction" had done nothing to disturb the long-established administrative rule that juvenile delinquencies were not "crimes" for the purposes of immigration law. 22 I. & N. Dec. 1362, 1369–70 (BIA 2000).

Coop. v. Layng, 930 F.3d 844, 852 (7th Cir. 2019) (concluding that Congress was aware of the courts' "broad" interpretation of a statutory term, and because Congress had refrained from narrowing it, it remained undisturbed).

In overruling *Cota-Vargas* and concluding otherwise in *Thompson/Thomas*, the AG contorted the text of the statute and improperly conflated congressional intent behind the separate and distinct statutory provisions defining "conviction" and "sentence." Although the AG purports to conduct a textual analysis of § 1101(a)(48)(B), he does no such thing. Rather, the AG contends that because the statutory text requires disregarding "any suspension of the imposition or execution" of a sentence, it "*suggest[s]* that other post-sentencing events—such as modifications or clarifications—should not be relevant under the immigration laws." 27 I. & N. Dec. at 682 (emphasis added). The AG's reading misunderstands criminal procedure and defies logic. A "suspension" is not a "post-sentencing" event, and, contrary to his reading, nothing about the statutory text even remotely "suggest[s]" that sentence modifications or alterations should be disregarded. Accordingly, applying the well-established statutory construction principle from *Lorillard*, this Court should conclude, as a textual matter, that § 1101(a)(48)(B) superseded the rule respecting the suspension of imposed sentences but otherwise left all decisional law about the sentence definition intact.

Although the foregoing should compel the Court to declare *Thomas/Thompson* wrong as a matter of law, concerns respecting federalism and the related substantive canon of statutory construction only further reinforce that

conclusion.[9] As a textual matter, the federalism canon's constitutional grounding may lend it particular weight in comparison to other substantive canons that courts apply when assessing congressional intent. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 168–173 (2010). Indeed, this Court has previously recognized federalism as a principle in statutory interpretation. *See, e.g.*, *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636, 652 (7th Cir. 2014) (Sykes, J., concurring) ("[O]ur statutory interpretation inquiry should be informed by important background principles of federalism."); *City of Chicago v. Barr*, 961 F.3d 882, 892 (7th Cir. 2020) ("The federal government cannot merely conscript the police forces of the state or local governments to achieve its ends; that would eviscerate the principles of federalism that rest at the very foundation of our government.").

A state's authority to regulate the health, safety, and welfare of its citizens through the legislation and enforcement of its criminal laws is fundamental. *See* U.S. CONST. amend. X; *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 citations omitted)); *United States v. Morrison*, 529 U.S. 598, 618 (2000). The enforcement and adjudication of criminal law is perhaps the quintessential state power. *See Bond v. United States*, 572 U.S. 844, 858 (2014);

[9] *Amici* agree with Ms. Zaragoza that the Court can strike down *Thomas/Thompson* on the sole ground that the Full Faith and Credit Act, 28 U.S.C. § 1738, requires the BIA to give effect to all state court sentencing modifications. Pet'r Br., 32–37. But as Ms. Zaragoza also argues, *Thomas/Thompson* violates broader federalism concerns too.

Heath v. Alabama, 474 U.S. 82, 93 (1985). The modification, adjustment, or alteration of a criminal sentence is therefore precisely the type of reserved power a state possesses to regulate is residents.

Given this well-established constitutional design, Congress must be clear if it intends to alter the balance of power between the federal government and the states. *See Gregory v. Ashcroft*, 501 U.S. at 452, 460 (1991); *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976), *superseded by statute as recognized in Kansas v. Garcia*, 140 S. Ct. 791, 797 (2020); *cf. Vartelas v. Holder*, 566 U.S. 257, 266–69 (2012) (declining to apply IIRIRA retroactively absent a clear statement to that effect); *INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001) (declining to interpret IIRIRA to strip federal courts of jurisdiction to hear noncitizens' habeas petitions absent a clear statement to that effect). Yet, as discussed above, 8 U.S.C. § 1101(a)(48)(B) contains no statement—and certainly not an unmistakably clear one—suggesting that Congress intended for immigration adjudicators to disregard a criminal sentence altered by a criminal court. Consequently, when a state court alters a previously imposed criminal sentence—regardless of the reason—that decision must be honored by immigration judges and the BIA.

Congress knows how to include a clear statement to override state criminal processes and has clearly done so in other contexts. For example, the Medicare and Medicaid Patient and Program Protection Act of 1987, for instance, defines the term "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). Here, Congress declined to craft a statutory provision that would so clearly frustrate a state's ability to regulate its residents, and this Court should therefore conclude that the AG's contrary conclusion is wrong as a matter of law.

***

The plain text of § 1101(a)(48)(B) unambiguously forecloses the AG's interpretation in *Thomas/Thompson*, as demonstrated above. However, should this Court conclude that the statute is ambiguous, it must resolve any ambiguity in Ms. Zaragoza's favor under the rule of lenity and the presumption against deportation. *E.g.*, *United States v. Shabani*, 513 U.S. 10, 17 (1994) (explaining that the rule of lenity applies when, "after consulting traditional canons of statutory construction, [the court is] left with an ambiguous statute"); *cf. Esquivel-Quintana*, 137 S. Ct. at 1574.

The rule of lenity is a "time-honored" rule of statutory interpretation, *Crandon v. United States*, 494 U.S. 152, 158 (1990), that applies to dual-application statutes like the INA. The Supreme Court has so recognized, explaining that where a statute that has criminal and civil application "lack[s] clarity on [a particular] point," courts are "constrained to interpret any ambiguity in the statute in [the] petitioner's favor" in order to narrow the statute's punitive reach. *Leocal*, 543 U.S. at 11 n.8; *see also Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028 (6th Cir. 2016)

(Sutton, J., dissenting in part and concurring in part), *rev'd sub nom. Esquivel-Quintana*, 137 S. Ct. 1562.

Applying the rule of lenity in this case requires the construction of § 1101(a)(48)(B) consistent with the prior agency interpretation dating back decades to *Martin*, as the AG's interpretation in *Thomas/Thompson* broadens the statute's punitive reach. Under the AG's erroneous reading, only a fraction of sentence modifications will be effective for immigration purposes. For instance, even if a sentence is modified for an underlying defect, but the state's record-keeping system does not sufficiently indicate the reason for the vacatur, a noncitizen would be subject to the adverse consequences attached to his original, now altered sentence rather than the only lawful, and operative, modified sentence.

2. Even if the *Chevron* framework applied, and the Court finds the statute ambiguous, the AG's interpretation in *Thomas/Thompson* is unreasonable

For the reasons already articulated, the Court should not reach a *Chevron* step-two analysis. However, were the Court to disagree, it should nevertheless conclude that *Thomas/Thompson* provides an unreasonable interpretation of § 1101(a)(48)(B).

First, the AG's interpretation inexplicably and improperly extends the legislative history behind the definition of *conviction* to the carefully crafted definition of *sentence*, conflating these two immensely distinct concepts. *See Thomas/Thompson*, 27 I. & N. Dec. at 682–83. Findings of guilt are fundamentally different from sentencing determinations. *E.g.*, *State v. Hanes*, 790 N.W.2d 545, 549

(Iowa 2010) ("[P]enalties have nothing to do with the factual determination that a defendant did or did not commit a crime." (citation omitted)); *People v. Farrar*, 419 N.E.2d 864, 865–66 (N.Y. 1981) (distinguishing between the "court's role in sentencing and accepting a plea"). Unlike findings of guilt, sentencing is wholly within the purview of the trial judge, who "must perform the delicate balancing necessary to accommodate the public and private interests represented in the criminal process" and consider "the particular circumstances of the individual before the court and the purpose of the penal sanction, i.e., societal protection, rehabilitation and deterrence." *People v. Karson*, 68 N.Y.S.3d 315, 321–22 (N.Y. Co. Ct. 2017). Congress, of course, is wholly aware of the fundamental difference between convictions and sentences, and nothing in the text of § 1101(a)(48)(B) or its legislative history indicates Congress intended to treat these two concepts the same. Yet, by extending the *Pickering* rule regarding convictions to the sentencing realm, that is precisely what the AG's decision mandates.

Furthermore, *Thompson/Thomas* constitutes an unreasonable interpretation of § 1101(a)(48)(B) because it requires an immigration agency to perform the role of a state court sentencing judge and act as the ultimate arbiter of what an appropriate criminal sentence should be. For obvious reasons, the agency has traditionally shied away from this role because of the inefficiencies, unfairness, difficulty—and most importantly, impropriety—inherent in conducting pseudo criminal trials in removal proceedings that impugn the legitimacy of state court sentencing decisions. *Cf. Matter of J- & Y-*, 3 I. & N. Dec. 657, 659–60 (BIA 1949)

(recognizing, since at least the post-World War II era, that state court judgments generally are not subject to collateral attack in immigration proceedings, even when the state court has erred). This difficulty and impropriety is even more stark here because the scope of *Thomas/Thompson*'s holding grievously misunderstands the sentencing exercise. Under the AG's ruling, "[i]f the state court alters a [noncitizen's] sentence *on the basis of something other than a procedural or substantive defect*, then the alteration has no effect and the immigration judge need inquire no further." 27 I. & N. Dec. at 684 (emphasis added). But sentencing judges do not make sentencing determinations based on *one* factor alone. To the contrary, sentencing judges are required to consider a slew of factors, *e.g.*, *Karson*, 68 N.Y.S.3d at 321–22, and "[a] trial judge is not required to enumerate each factor he considered in arriving at the sentence[,]" *see, e.g.*, *People v. Case*, 616 N.E.2d 601, 609 (Ill. App. Ct. 1993). Under the AG's ruling, immigration judges now seemingly have a *carte blanche* to look behind sentencing judgments and determine—without any substantive expertise—whether "something other than a procedural or substantive defect" influenced the criminal law judge's resentencing decision. *Nothing* in § 1101(a)(48)(B) even remotely suggests that Congress intended for the agency to question sentencing judgments or discretion, let alone in such a boundless manner.

II. *Thomas/Thompson* Cannot Apply Retroactively

Finally, *Amici* agree with Ms. Zaragoza that the five-factor framework for assessing retroactivity set forth in *Retail, Wholesale & Dep't Store Union v. NLRB*,

466 F.2d 380, 390 (D.C. Cir. 1972) ("*Retail, Wholesale*"), should be applied to her case, and that all five of the factors should weigh decisively against application of *Thomas/Thompson* to her sentence modification. Pet'r Br., 38–43. Here, *Amici* offer additional background about the crucial reliance interests of noncitizens like Ms. Zaragoza—interests that should be of obvious concern in this context, are of particular relevance to the second, third and fourth factors of the *Retail, Wholesale* test, yet were never identifiably factored by the BIA in her case or by the Attorney General in *Thomas/Thompson*. Pet'r Br., 7.

Here, the second and third *Retail, Wholesale* factors are closely entwined. It was well-settled law before *Thomas/Thompson* that sentence modifications made by criminal courts would be given full legal effect in immigration proceedings, regardless of the criminal courts' reasons for such modifications. *See supra* Section I.A. *Cota-Vargas* and *Song* correctly reaffirmed the BIA's decades-old understanding that state court sentencing orders are due full faith and credit, and correctly treated this rule as a required and long-standing principle that Congress had appropriately baked into 8 U.S.C. § 1101(a)(48)(B). *See supra* Section I.A.

The clarity and unbroken consistency of this long-established rule unquestionably led many individuals to *actually* rely on it when making critical decisions in their criminal and immigration proceedings. Moreover, "the critical question is not whether a party actually relied on the old law, but whether such reliance would have been reasonable." *Velasquez-Garcia*, 760 F.3d at 582. Many noncitizens who might have pursued *other* options towards alleviating the

immigration consequences of their criminal sentences—including but certainly not limited to the option of filing a more elaborate sentence modification motion fashioned around then-irrelevant *Pickering* standards—of course never pursued other options at all. Instead, they reasonably relied on the simple rule reflected in the statute and unambiguously repeated in agency precedents spanning decades, from *Cota-Vargas* back as far as the 1950s. *See, e.g.*, *C-P-*, 8 I. & N. Dec. at 508.

Before the AG took up *Thomas/Thompson*, there was no reasonable basis to anticipate the misguided rule the agency would adopt and attempt to apply to noncitizens like Ms. Zaragoza. Any reasonably informed attorney, consulted by a noncitizen in Ms. Zaragoza's position, would reasonably have advised that noncitizen that *Cota-Vargas* represented the most straightforward option to achieve an overwhelmingly important objective. Training and leading reference materials used by criminal and immigration practitioners to advise noncitizens expressly characterized the BIA's prior case law as holding that it "w[ould] respect a trial court's reduction of a defendant's sentence even if the judge lowered the sentence for equitable reasons" and that "the immigration fact finder will treat the later sentences as the controlling sentences" if an initial sentence is modified. DAN KESSELBRENNER, LORY D. ROSENBERG & MARIA BALDINI-POTERMIN, IMMIGRATION LAW AND CRIMES 98 (2019 ed.); *see also* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 344 (16th ed. 2018) (citing *Matter of Song* and *Matter of Cota-Vargas* and advising that an individual will not be considered convicted of an aggravated felony even if their sentence is modified *nunc pro tunc* to avoid immigration

consequences); KATHERINE BRADY & DAN KESSELBRENNER, GROUNDS OF DEPORTABILITY AND INADMISSIBILITY RELATED TO CRIMES 4 (2012) (emphasizing the BIA's differing standards for the validity of vacaturs and sentence modifications and noting that immigration authorities "must respect a sentence reduction" made for any reason).

The extreme burdens that retroactive application of *Thomas/Thompson* will inflict with respect to the fourth *Resale, Wholesale* factor are equally clear. The Supreme Court has long recognized that "deportation may result in the loss 'of all that makes life worth living.'" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). It is a "particularly serious penalty" that it will often exceed in severity any harms imposed by an underlying criminal sentence. *Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) (citing *Padilla v. Kentucky*, 599 U.S. 356, 365 (2010)). Indeed, deportation is so uniquely harmful that it triggers special constitutional safeguards for noncitizens in criminal proceedings themselves. *Id. Mellouli v. Lynch* acknowledges that the outsized burdens associated with deportation are what drive many noncitizens in their legitimate pursuit of "safe harbor" pleas that allow them "to anticipate the immigration consequences" and avoid "the risk of immigration sanctions." 135 S. Ct. 1980, 1987 & n. 5 (2015) (internal quotations and citations omitted). These Supreme Court decisions give proper weight to the extraordinary burdens inflicted by deportation, and this underscores the corresponding gravity of the reliance interests that countless noncitizens like Ms. Zaragoza, Mr. Thomas, and Mr. Thompson

reasonably placed in the long-established and legally correct rule *Cota-Vargas* confirmed with respect to criminal sentence modifications.

Allowing retroactive application of *Thomas/Thompson* would negatively burden large categories of noncitizens in a variety of ways that "commonsense . . . considerations of fair notice, reasonable reliance, and settled expectations[,]" cannot possibly allow. *Velasquez-Garcia*, 760 F.3d at 579 (internal citations and quotations omitted). Countless lawful permanent residents previously assured that a criminal sentence modification negotiated in good faith with a state prosecutor would allow them to go on with productive lives in this country, continue raising their families, and eventually seek full U.S. citizenship, will instead—overnight—become aggravated felons with no eligibility for relief from removal. Many others, like Ms. Zaragoza, who were reasonably promised that they would be eligible to benefit from humanitarian relief such as cancellation of removal, will learn that the promise has been revoked. *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3)).

Without warning, noncitizens will be rendered ineligible for other discretionary relief, including adjustment of status and waivers of inadmissibility designed to protect victims of domestic violence. *See* 8 U.S.C. §§ 1255, 1229b(b)(2)(A)(iv)) (*see* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), (II)). Longtime lawful permanent residents will lose the freedom they believed they had to travel abroad without facing removal proceedings upon return to their lives in the United States. Some fleeing persecution will find out that they and their derivative spouses and children have lost eligibility for asylum, *see* 8 U.S.C. § 1158(b)(2)(B)(i)), while others

will no longer be able to seek withholding of removal to countries where it is "more likely than not" their lives or freedom will be lost. 8 U.S.C. § 1231(b)(3)(B)(ii). For these people and others the "burden is immense[,]" *Velasquez-Garcia*, 760 F.3d at 584. The impact their families will only enhance the unfairness of this retroactive damage. *Thomas/Thompson* must not be given retroactive effect.

CONCLUSION

The Court should grant the petitions for review.

Dated: August 10, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(g)(1) and Circuit Rule 32, the attached brief of amici curiae complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Century Schoolbook font. In addition, the attached brief complies with FED. R. APP. P. 32(a)(7) and Circuit Rule 32 because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 6993 words.

Dated: August 10, 2020

/s/ Nadia Anguiano-Wehde
Nadia Anguiano-Wehde

CERTIFICATE OF SERVICE

I certify that on August 11, 2020, I electronically filed the foregoing brief of *Amici Curiae* (with corrected pagination to the table of contents) with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Benjamin Casper Sanchez
Benjamin Casper Sanchez

ADDENDUM

Detailed Interest Statements by *Amici* Organizations

American Immigration Lawyers Association (AILA) is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors, who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; and it seeks to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and United States Supreme Court.

American Immigration Council (the Council) works to strengthen America by shaping how America thinks about and acts towards immigrants and immigration and by working toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring. The Council has a substantial interest in ensuring that noncitizens receive the full benefit of state court sentencing modifications and clarifications, as required by the Immigration and Nationality Act.

Immigrant Legal Resource Center (ILRC) is a national non-profit resource center whose mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. The ILRC has a direct interest in this case because it advocates for greater rights for noncitizens accused or convicted under criminal laws, and each year provides assistance to hundreds of attorneys nationally who represent noncitizens in criminal courts, removal proceedings, and applications for naturalization and other immigration benefits.

Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights.

National Immigration Project of the National Lawyers Guild (NIPNLG) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. NIPNLG provides legal training and technical assistance to the bench and the bar on the

immigration consequences of criminal conduct and the rights of noncitizens. It is the author of numerous practice advisories as well as *Immigration Law and Crimes* and four other treatises published by Thomson Reuters. NIPNLG has participated as *amicus curiae* in several significant immigration-related cases before the Supreme Court, the Courts of Appeals, and Board of Immigration Appeals. NIPNLG has a direct interest in ensuring that the rules governing criminal sentences for immigration purposes are fair and predictable.

Harvard Law School Crimmigration Clinic seeks to advance the rights of immigrants who have been impacted by the criminal law system through clinical legal education. The Clinic engages in direct representation, policy advocacy, and impact litigation at the intersection of criminal law and immigration law. The Clinic therefore has a direct interest in the outcome of this case which could have a significant impact on the Clinic's clients.

National Immigration Litigation Alliance (NILA) is a non-profit organization that seeks to realize systemic change in the immigrants' rights arena through federal court litigation. NILA engages in impact litigation to extend the rights of noncitizens and to eliminate systemic obstacles they or their counsel routinely face. In addition, NILA builds the capacity of social justice attorneys to litigate in federal court by co-counseling individual federal court cases and by providing strategic advice and assistance to its members. NILA and its members are acutely aware of the serious statutory, constitutional, and retroactivity concerns

created by the Attorney General's unilateral decision to upend decades of governing law by attaching new consequences to modified sentences.