UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

Matter of Michael Vernon THOMAS, Respondent.

Matter of Joseph Lloyd THOMPSON, Respondent.

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Interim Decision #3954
27 I&N Dec. 556 (A.G. 2019)

BRIEF OF BROOKLYN DISTRICT ATTORNEY ERIC GONZALEZ AND 42 OTHER ELECTED LAW ENFORCEMENT OFFICIALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, and under what circumstances, judicial alteration of a criminal conviction or sentence—whether labeled "vacatur," "modification," "clarification," or some other term—should be taken into consideration in determining the immigration consequences of the conviction.

INTEREST OF AMICI

Amici curiae are Brooklyn District Attorney Eric Gonzalez and 42 other state and local elected prosecutors and attorneys general from across the nation. As elected law enforcement officials, amici are responsible for pursuing justice, protecting public safety, and enforcing the laws of the local jurisdictions and states they serve. Every day, prosecutors within these offices are responsible for making charging decisions and recommending sentencing and post-sentencing actions. In doing so, prosecutors advance the interests of their communities by making discretionary judgments as to what conduct to prosecute and what punishments to seek. Prosecutors are elected by, and accountable to, their communities. Prosecutors have two primary goals: protecting the public safety of residents and protecting the integrity of the justice system.

These discretionary prosecutorial judgments, as well as the role of the prosecutor as a "minister of justice," are devalued when the federal government does not honor state decisions to modify a criminal conviction or sentence. Amici submit this brief to underscore how the refusal of the federal government to recognize state modifications of convictions and sentences would undermine the role of prosecutors in the criminal justice system and the sovereignty of states to enforce their criminal laws and exercise prosecutorial discretion in the interests of public safety and justice.

PRELIMINARY STATEMENT

Under federal law, any non-citizen who is "convicted" of a criminal offense falling within an enumerated list of categories—including crimes of moral turpitude, aggravated felonies, and certain firearm and drug crimes—is subject to removal.[1] In 1996, Congress adopted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") which amended the Immigration and Nationality Act ("INA") and, for the first time, set forth a statutory definition for "conviction":

> 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 (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[2]

There is no question that Congress could have specified an exhaustive list of actual crimes for which conviction determines removability.[3] By not doing so, Congress assigned some measure of authority in the removal process to the states, in deference to their abiding role in the American system of criminal justice.[4] Indeed, the vast majority of non-citizens removable under

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[1] *See* 8 U.S.C. §§ 1227(a)(2), 1182(a)(2)

[2] Pub. L. 104-208, § 322, 110 Stat. 3009, 3009-628 (Sept. 30, 1996), *codified at* 8 U.S.C. § 1101(a)(48).

[3] *Cf.* 49 U.S.C. § 44936(b)(1)(B) (enumerating list of crimes preventing employment by an air carrier or airport operator); *see also Saleh v. Gonzales*, 495 F.3d 17, 24 (2d Cir. f 2007) ("[S]tate convictions are a useful way for the federal government to identify individuals who, because of their criminal history, may be appropriate for removal . . . ."); Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. 1411, 1418, 1428 (2005) (discussing congressional usage of state determinations).

[4] *See* Mikos, *supra*, at 1428.

a provision of the INA for which removability turns on a "conviction" have been convicted of a state crime rather than a federal one.[5]

The Board of Immigration Appeals ("BIA") is charged with applying Congress's statutory command that certain immigration consequences, including removal from the United States, be imposed on non-citizens convicted of certain criminal offenses. But the BIA must interpret the immigration statutes in light of prosecutors' decisions about local criminal issues. The BIA's current approach to defining "conviction" and applying that definition respects this balance. Under current law, the decision to vacate a non-citizen's criminal conviction is always credited for federal immigration purposes if the vacatur was based on a substantive or procedural defect in the underlying conviction.[6] Additionally, the BIA will always give full effect to a *nunc pro tunc* sentencing modification.[7]

The BIA's bright-line rules afford states the necessary deference as the primary actors charged under our federal system with administering and exercising the police power. This approach is endorsed by the purpose and structure of the INA and is consistent with historical deference to state sovereignty. It also has practical benefits for the administration of justice by local prosecutors and avoids the need for immigration courts to engage in difficult fact-finding

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[5] *See* Note, *States' Commandeered Convictions: Why States Should Get a Veto Over Crime-Based Deportation*, 132 Harv. L. Rev. 2322, 2322 (2019).

[6] *Matter of Pickering*, 23 I. & N. Dec. 621, 624-25 (BIA 2003); *see Prado v. Barr*, 923 F.3d 1203, 1206 (9th Cir. 2019); *Pickering v. Gonzales*, 465 F.3d 263, 270 (6th Cir. 2006) ("A vacated conviction remains valid for immigration purposes only if it was vacated *solely* for rehabilitative reasons.").

[7] *Matter of Cota-Vargas*, 23 I. & N. Dec. 849, 852 (BIA 2005); *see Boar v. Holder*, 475 F. App'x 615, 617 (6th Cir. 2012) ("[A] trial court's decision to modify or reduce an alien's sentence *nunc pro tunc* is entitled to full faith and credit, and . . . the modification or reduction is valid for purposes of the immigration law without regard to the court's reasoning for its decision.").

relating to underlying offenses in a situation often far removed from the offense conduct. This approach should be reaffirmed and maintained.

ARGUMENT

I. States Have a Recognized Sovereign Interest in the Enforcement of Criminal Laws and the Authority to Vacate, Modify, or Clarify a Criminal Judgment

A. The Federal Government May Not Intrude on the States' Sovereign Police Powers, Subject to Limited Exceptions

It is axiomatic that the states are sovereign with respect to the enforcement of their own criminal laws. As the Supreme Court has emphasized, "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law."[8] Punishment of local criminal activity is "[p]erhaps the clearest example of traditional state authority" that cannot be displaced without a clear statement of an intention to do so.[9] This principle, according to the Supreme Court, is "one of the few principles that has been consistent since the [Constitution] was adopted" and is "deeply ingrained in our constitutional history."[10]

More broadly, the Constitution "created a Federal Government of limited powers, while reserving a generalized police power to the States."[11] The police power includes not only the power of states "to determine what shall be an offense against its authority and to punish such offenses,"[12] but also a general obligation "to protect the public health and secure the public

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[8] *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted); *see Torres v. Lynch*, 136 S. Ct. 1619, 1629 n.9 (2016).

[9] *Bond v. United States*, 572 U.S. 844, 858 (2014).

[10] *United States v. Morrison*, 529 U.S. 598, 618 & n.8 (2000).

[11] *Id.* at 618 n.8 (internal quotation marks omitted); *see also Nat'l Fed. of Ind. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 557 (2012) ("Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.").

[12] *Heath v. Alabama*, 474 U.S. 82, 89 (1985).

safety."[13] States have broad discretion when it comes to carrying out their police powers.[14] States use police powers to reduce criminal recidivism,[15] regulate violent crime,[16] and prevent and punish violence.[17] More specifically, states exercise the discretion permitted by the police powers to make charging, sentencing, and post-sentencing decisions that affect a broad swath of individuals, including non-citizen criminal defendants.[18] The breadth of the police powers reserved to the states underscores the nature of the discretion given to state prosecuting authorities at all stages of the criminal process.[19]

B. IIRIRA Did Not Change the Federal Government's Traditional Deference to the States in the Context of Determining What a "Conviction" Is

Traditionally, the federal government has deferred to the states' determination of finality when asking whether a conviction counts for immigration purposes. The BIA has recognized the importance of state law in this process since at least 1942, when it relied on state procedures in making the determination of whether a conviction was "complete and solid" enough to support a

[13] *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905); *see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . . .").

[14] *See NFIB*, 567 U.S. at 536 ("Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed.").

[15] *See Ewing v. California*, 538 U.S. 11, 25-26 (2003).

[16] *See Morrison*, 529 U.S. at 618.

[17] *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 625 (1958).

[18] *See Ochoa v. Bass*, 181 P.3d 727, 731 (Okla. Crim. App. 2008); *State v. Quintero Morelos*, 137 P.3d 114, 119 (Wash. Ct. App. 2006); *see also Padilla v. Kentucky*, 559 U.S. 356, 360-64 (2010) (discussing the transformation of discretion by state judges to prevent deportation).

[19] *See* Jason A. Cade, *Deporting the Pardoned*, 46 U.C. Davis L. Rev. 355, 385 (2012).

removal order.[20] While the BIA could not settle on a definition of "conviction" between that time and the adoption of IIRIRA, the federal government agreed that vacated convictions cannot serve as the basis for a deportation order and deferred to the state adjudication of such relief.[21]

In 1996, Congress adopted a statutory definition of "conviction" for the first time. This was done for the purpose of solving two distinct and narrow problems in the area of post-conviction relief. The first concerned "deferred adjudications." Prior to IIRIRA, the BIA only found a "conviction" if there were no further proceedings available to the defendant that concerned his guilt or innocence.[22] IIRIRA eliminated this aspect of the definitional inquiry—which exempted non-citizens from immigration consequences if the state deferred adjudications of guilt on the condition of future good behavior—and clarified 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."[23] Second, IIRIRA clarified that a suspended sentence cannot vitiate a "conviction," overruling BIA decisions holding that sentences suspended before they were carried out were not "actually imposed" for immigration purposes.[24]

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[20] *Matter of F----*, 1 I. & N. Dec. 343, 348 (BIA 1942). The importance of state law in determining whether a "conviction" had occurred was subsequently recognized by the Supreme Court. *See Pino v. Landon*, 349 U.S. 901 (1955) (per curiam).

[21] *See Lujan-Armendariz v. INS*, 222 F.3d 728, 740, 745 (9th Cir. 2000), *overruled on other grounds by Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc); *see also Pinho v. Gonzales*, 432 F.3d 193, 205-06 (3d Cir. 2005) ("When the Immigration and Nationality Act was first passed, it lacked a definition of the term 'conviction.' The INS relied on state law in determining whether an immigrant was 'convicted.'" (citing *Matter of Roldan*, 22 I. & N. Dec. 512, 514 (BIA 1999) (en banc))).

[22] *See Matter of Ozkok*, 19 I. & N. Dec. 546, 552 (BIA 1988).

[23] H.R. Rep. No. 104-828, at 224 (1996) (Conf. Rep.) (citing *Ozkok*, 19 I. & N. Dec. 546).

[24] *Id.* (citing *Matter of Castro*, 19 I. & N. Dec. 692 (BIA 1988), and *Matter of Esposito*, 21 I. & N. Dec. 1 (BIA 1995)).

The BIA's belief as to the limited scope of the definition of "conviction" was made clear in the years immediately following the enactment of IIRIRA. In *Pickering*, the BIA distinguished between procedural or substantive defects in the underlying proceedings and "post-conviction events, such as rehabilitation or immigration hardships."[25] The former, as discussed elsewhere in this brief, were and continue to be valid bases for a vacatur; the latter, following IIRIRA, are not. This balance was echoed in *Cota-Vargas* two years later.[26] The BIA has thus been consistent in its understanding that the statutory definition of "conviction" does not foreclose the recognition of all post-conviction relief in immigration proceedings.[27] Courts[28] and legal scholars[29] agree with this interpretation. Attorney General John Ashcroft, in a 2005 opinion, approvingly recounted BIA analysis of the text and legislative history of IIRIRA that concluded that the statute does not affect post-conviction relief.[30] There is no reason to upset the longstanding recognition of federal deference to state law when it comes to procedures for

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[25] 23 I. & N. Dec. at 624.

[26] *See* 23 I. & N. Dec. at 851.

[27] *See also Roldan*, 22 I. & N. Dec. at 531-32 (Villageliu, Board Member, concurring in part and dissenting in part); *see also id.* at 522 (majority opinion) (recognizing that Congress intended to focus the "conviction" inquiry on the "original determination of guilt").

[28] *See Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 332 (2d Cir. 2007) (recognizing as reasonable the BIA's interpretation that IIRIRA did not change the rule that "convictions vacated for reasons other than the underlying merits remain convictions for purposes of the immigration laws"); *Lujan-Armendariz*, 222 F.3d at 742 n.23, 745 (noting that IIRIRA was not intended "to alter the long-standing rule that a conviction entered but subsequently vacated or set aside cannot serve as the basis for a deportation order").

[29] *See* Daniel Kanstroom, *Immigration Enforcement and State Post-Conviction Adjudications: Towards Nuanced Preemption and True Dialogical Federalism*, 70 U. Miami L. Rev. 489, 513 (2016).

[30] *Matter of Marroquin*, 23 I. & N. Dec. 705, 710 (A.G. 2005) (approving of the BIA's interpretation of IIRIRA's scope, while holding on other grounds that an expungement is insufficient to cure a conviction for immigration purposes).

vacating convictions and modifying sentences, neither of which was affected by the IIRIRA amendments.[31]

II. Prosecutors Play a Fundamental Role in Implementing the Police Powers Reserved to the States

A. Prosecutors Use Their Discretion to Advance the Police Powers Reserved to the States

1. The power to prosecute derives from the inherent sovereignty of the states.

The prosecutorial role in implementing the state's police powers stems largely in part from the principle that the power to prosecute, including the determination of when not to prosecute, derives from the inherent sovereignty of states.[32] At the nation's founding, with many concerned about federal overreach into state matters, the framers pushed back on the national government, instead promising that "each state would retain primary regulatory authority over residents within its borders."[33] Components of this authority include prosecuting violations of civil and criminal codes, promoting public safety, and legislating internal policy—all of which have been referred to as "police powers."[34] The framers specifically recognized the import of state sovereignty over criminal law and the need to limit federal control over such matters.[35]

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[31] *See generally infra* Section III(A)(3).

[32] *Heath*, 474 U.S. at 89; *see also* Cade, *supra*, at 386 ("Federalism recognizes that decisions about how to punish and who to forgive for transgressions of the law of a sovereign are best made by the sovereign itself.").

[33] *See* Cade, *supra*, at 386 (citing, *inter alia*, The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961)).

[34] *Id.*

[35] *Id.* at 387; *see also id.* ("[S]tate control over the administration of criminal law within sovereign borders has persevered.").

A prosecutor's exercise of discretion plays a valuable and significant role in our constitutional and criminal justice systems.[36] The state or local prosecutor—not the federal government—is best positioned to exercise discretion properly with regards to state criminal prosecution and the impact it has within the local community. Prosecutors are on the front lines of the criminal justice system, and state law has armed them with discretion in sentencing procedures so that they may promote public safety and provide protections for victims and defendants alike. In doing so, prosecutors, on a daily basis, make nuanced considerations and balance the "benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State."[37] These decisions have political, social, and economic consequences for both the state and its residents, and are at the heart of the prosecutor's traditional role in the criminal justice system.[38]

[36] *Bond*, 572 U.S. at 864-65 (noting that the Supreme Court has "traditionally viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by the statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

[37] *Bond*, 572 U.S. at 865.

[38] Heidi Altman, *Prosecuting Post*-Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 Geo. L. J. 1, 53-54 (2012) (discussing decisions made by prosecutors that affect areas of law traditionally defined by the federal government); *see* Cade, *supra*, at 388-89 (pardons are "rooted in a sovereign's inherent authority to govern its own affairs . . . [and] there is little doubt that clemency powers were understood to fall within the sovereignty and self-governance that were reserved to the states when the national government was created"); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 405 (2006) (describing how plea determinations and collateral consequences have the effect of excluding the individual from benefits of participation in society).

2. Prosecutors would be hampered in their ability to use these powers effectively by a rule that does not give legal effect to valid vacaturs and modifications.

A rule that does not credit valid vacaturs or modifications for immigration purposes would interfere with prosecutors' ability to carry out their criminal-justice obligations. Under the BIA's current bright-line rules, prosecutors can correct legal or procedural errors that resulted in an unwarranted conviction or sentence. The ability to correct such errors allows prosecutors to maintain community trust and to do their job in a way that results in the actual effectuation of justice.[39] Prosecutors and law enforcement officials also rely on the cooperation of crime victims and witnesses in solving crime and bringing responsible parties to justice. This cooperation depends on building trust between law enforcement and the community it seeks to protect, which in turn requires that people view the justice system as legitimate and procedurally fair.[40] Overriding local prosecutorial determinations and attaching immigration consequences to convictions vacated for valid substantive or procedural reasons undermines transparency and a public sense of consistently applied legal principles, and therefore imperils public trust and perceptions of legitimacy. When a community sees the justice system as illegitimate, members of the community are less likely to cooperate with law enforcement, to assist in investigations, or to report crimes against them—even violent crimes.[41] By disregarding state and local decisions,

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[39] *See* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. Ill. L. Rev. 1573, 1593-94.

[40] In fact, research shows that people are more likely to obey the law when they see authority as legitimate. *See, e.g.*, Tom R. Tyler, *Why People Obey the Law* 31, 64-68 (1990) ("These studies suggest that those who view authority as legitimate are more likely to comply with legal authority . . . ."); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. Rev. 622, 667 (2015).

[41] One survey of police officers found that immigrant communities generally are already hesitant to report crime. Robert C. Davis, Edna Erez & Nancy Avitabile, *Access to Justice for Immigrants Who Are Victimized: The Perspectives of Police and Prosecutors*, 12 Crim. Just. Pol'y Rev. 183, 187 (2001).

the federal system may undermine the legitimacy of all justice system actors, and accordingly threaten public safety.

In addition, the current rules limit unnecessary and burdensome fact-finding, whether in the first instance by local prosecutors or courts or at a later stage by the federal government. State courts that are asked to grant a vacatur or modify a sentence should not have to conduct a searching inquiry into the reasoning for such a step if the court already believes, under existing rules, that the prosecutor is using her discretion in a valid manner. Federal officials, meanwhile, would be faced with the difficult—if not impossible—job of reconstructing the underlying facts and discretionary judgments involved in the adjudication of criminal cases. Making this task even harder is the fact that federal immigration officials are already under a heavy administrative burden,[42] something that would only be increased with the addition of fact-finding steps previously committed to the discretion of state prosecutors.

The BIA's current bright-line rules are not only permissible; they are the only way to enforce the law while not unfairly infringing on—and burdening—the autonomy of state criminal-law officials to do their jobs.

3. Communities leverage the democratic process to hold prosecutors accountable for their use of discretion.

Prosecutors are not only stewards of public safety, but are also elected representatives or agents of elected representatives responsible for implementing and enforcing the law as created by democratically elected individuals.[43] Voters in 45 states elect the top prosecuting official in

[42] *See* U.S. Gov't Accountability Office, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438 (2017), https://www.gao.gov/assets/690/685022.pdf.

[43] *See Metro. Life Ins. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." (internal quotation marks omitted)).

that state.[44] These individuals run on promises and expectations of certain goals and values, including that they will be accountable for their discretionary actions.[45] Further, prosecutors play a key role in implementing the laws crafted by state legislatures by representing the state, their communities, and victims when there are challenges to or violations of the laws approved by voters and adopted by state governments.

Should the federal government refuse to adhere to state determinations, it would essentially ignore the right of the local electorate to determine what constitutes a crime and who is responsible for enforcing that standard. Prosecutors must be accountable to the community that elected them and not divorced from them as when their decisions are set aside by federal authorities.

B. The Federal System's Refusal to Accept State Judgments to Vacate, Modify, or Clarify Sentences as Binding Would Interfere with Prosecutors' Ethical Obligations

Prosecutors are often labeled "ministers of justice" and are considered to have dual roles: prosecuting within an adversarial system while also acting in the public interest.[46] Under nationally recognized standards, prosecutors have a duty to pursue justice and to "put the rights and interest of society in a paramount position in exercising prosecutorial discretion in individual

[44] Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 Crime & Just. 1, 2 (2012).

[45] Cade, *supra*, at 404 ("[L]ocal governments should be accountable for processes that impact perception of the systemic integrity of the criminal justice system, as well as the importance of membership decision and the community impact of convictions under that government's laws.").

[46] *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that the prosecutor "is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and who interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

cases."[47] This includes a duty to promote public safety, to advocate for victims' rights, and to implement reforms to criminal laws or enforcement policy whenever appropriate and necessary.[48]

In the context of immigration law, these duties require the prosecutor to consider the immigration consequences of the penalties and the impact of the penalty on the defendant's family and community.[49] This requirement was highlighted by the Supreme Court in *Padilla*, which noted the common societal interest that prosecutors and defense attorneys have in coming to agreements informed by immigration contexts.[50] By elevating immigration considerations during pleas and sentencing, the Supreme Court has obliged prosecutors to consider these consequences when deciding whether to support or object to a petition to modify or vacate a sentence. It is the prosecutor's responsibility to determine how much weight to give to these considerations. The federal system would undermine this determination by disregarding the prosecutor's decision.

III. The States' Ability to Determine What a "Conviction" Is Lies at the Heart of the United States' Dual-Sovereignty Structure

Any adjustment by a state to a defendant's sentence following an unchallenged guilty conviction should be credited for immigration purposes as the sole and final decision of the state

[47] National District Attorneys Ass'n, National Prosecution Standards, Rule 1-1.1 to 1.1.2 (3d ed. 2009); Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-1.2(c) (Am. Bar Ass'n 1993); ABA Model Rules of Professional Conduct Rule 3.8 cmt. 1 (Am. Bar Ass'n 1983).

[48] *See, e.g.*, *In re Peasley*, 90 P. 3d 764, 772 (Ariz. 2004) (observing that a prosecutor's interest "is not that [he] shall win a case, but that justice shall be done"); *State v. Pabst*, 996 P.2d 321, 328 (Kan. 2000) ("A prosecutor is a servant of the law and a representative of the people . . . ."); *Hosford v. State*, 525 So. 2d 789, 792 (Miss. 1988) ("A fearless and earnest prosecuting attorney . . . is a bulwark to the peace, safety and happiness of the people.")

[49] Altman, *supra*, at 43.

[50] 559 U.S. at 373.

in a criminal matter. This conclusion follows naturally from the basic federal structure of government in the United States—a structure that mandates that sensitive decisions about local criminal-justice matters be made by state, not federal, officials. The trust placed in local officials by the immigration laws is not unique to the INA; this structure is present throughout the United States Code. A rule that would refuse to give appropriate deference to state officials' adjudication of criminal matters is manifestly indefensible on these grounds.

A. It Contravenes Basic Principles of Federalism to Have Instrumentalities of the Federal Government Overriding State Conviction Determinations

1. Federal officials should not speculate about the reasons behind a valid vacatur or modification.

At its core, federalism ensures mutual respect between the federal government and the states.[51] When the states are acting within "a protected sphere of state sovereignty," the federal government must yield to legitimate state interests.[52] This respect derives from the concept of the federal and state governments as "separate sovereigns"; each has its own "inherent sovereignty" to which the other must defer.[53]

Because our federal system—which, as set forth above, is implicated by an enforcement structure that specifically contemplates a role for state discretion—is built on notions of comity and respect, courts do not permit "speculation by federal agencies about the secret motives of state judges and prosecutors" to play any role in the decision whether to credit an otherwise valid

[51] *Younger v. Harris*, 401 U.S. 37, 44 (1971) (explaining that federalism is based on "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"); *see Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting).

[52] *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 852 (1995) (Thomas, J., dissenting).

[53] *Heath*, 474 U.S. at 89; *see Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

modification.[54] The federal government—from federal courts to immigration judges—instead presumes that state courts are acting in good faith, and proceeds to ask whether the requirements for a valid vacatur or modification are otherwise met.[55] A contrary approach would encourage federal officials to level "accusations of dishonesty or complicity in 'subversion' . . . at state courts and prosecutors," an outcome that would undermine confidence in state courts and deny them the respect they are owed under the Constitution.[56]

2. State courts and prosecutors should not have to worry about how their discretionary charging, sentencing, and post-sentencing decisions will be interpreted by federal officials.

This careful federal balance would similarly be turned on its head if state courts and prosecutors could not be confident that their discretionary decisions would be respected by the federal government. State courts and prosecutors should be able to make charging, sentencing, and post-sentencing decisions without having to predict how these decisions will be interpreted by federal officials. To be sure, states are permitted to consider federal goals in making these decisions—but they do not have to.[57] There are many reasons why a state court or prosecutor would seek to vacate a conviction or modify a sentence, beyond the impact on the defendant's immigration consequences.[58]

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[54] *See Pinho*, 432 F.3d at 214-15.

[55] *See id.* at 214 (disapproving of the "concern . . . that the integrity of legal proceedings in state courts cannot be trusted").

[56] *Id.*

[57] *See Pickering*, 465 F.3d at 270 ("A vacated conviction remains valid for immigration purposes only if it was vacated *solely* for rehabilitative reasons.").

[58] Indeed, as *Pickering* holds, the state *must* have a non-immigration reason for vacatur. *See* 23 I. & N. Dec. 621.

3. Given these concerns, principles of statutory interpretation counsel against ignoring prosecutorial post-conviction actions.

It is clear, then, that ignoring states' valid role in the criminal process would raise serious federalism concerns. Supreme Court precedent makes clear that a congressional statute should not be interpreted to raise such concerns without "clear and manifest" evidence that Congress intended such a result.[59]

There can be no doubt that Congress did not intend to displace state law when it comes to modification and re-sentencing. As discussed above, it is clear that by adopting a definition of "conviction" that expressly precludes certain forms of post-conviction relief, neither of which is at issue here, Congress chose to leave in place the preexisting regime of deferring to state decisions involving vacaturs and sentencing.[60] Without a clear statement of congressional intent to do otherwise, the Attorney General should not disturb the settled interpretation of "conviction."[61]

B. The Immigration Law's Dual-Enforcement Structure Is Present in Other Congressional Schemes

Finally, it is important to note that the type of federalism envisioned by the INA is present in many other congressional schemes. For instance, any student who has been "convicted of any offense under any Federal or state law involving the possession or sale of a

[59] *See Arizona v. United States*, 567 U.S. 387, 400 (2012); *Gregory*, 501 U.S. at 460. This rule is particularly strong where the questioned interpretation of federal law would supersede "the historic police powers of the States." *Arizona*, 567 U.S. at 400.

[60] *See supra* Section I(B); *see also, e.g.*, *Arizona*, 567 U.S. at 402-03 (striking down Arizona law mandating non-citizen registration as incompatible with Congress's careful statutory scheme setting forth exclusive federal regulation over this area of law); *Davila v. Lang*, 343 F. Supp. 3d 254, 279-80 (S.D.N.Y. 2018) (dismissing state-law claim involving non-attorney accreditation before the Executive Office of Immigration Review, given that federal law assigns a federal official "the sole authority to make determinations regarding the approval and termination of non-attorney accreditation").

[61] *See Gregory*, 501 U.S. at 460-61; *see also* Cade, *supra*, at 406-20.

controlled substance" may be ineligible for further federal student aid.[62] Additionally, no person "who has been convicted of a felony[] may be enlisted in any armed force."[63] By contrast, when Congress has wanted to rely on state criminal procedures but control the applicability of post-conviction relief, it has done so clearly.[64] These examples make clear that the immigration law is not anomalous when it comes to reliance on state criminal procedures, and it should not be interpreted to run afoul of bedrock principles of federalism.

* * *

The federalism exemplified by the INA lies at the heart of the American system of governance. Such schemes often involve overlapping priorities and prerogatives—in this case, combining the federal obligation to regulate national immigration with the state obligation to enforce the criminal law. But in order for this scheme to work, both sides must treat each other with respect, being careful not to overstep the federal-state balance of power. In the context of collateral consequences for criminal convictions, this balance can be preserved by continuing to credit for immigration purposes any adjustment by a state to a defendant's sentence, or vacatur of the conviction for valid procedural or substantive reasons.

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[62] 20 U.S.C. § 1091(r).

[63] 10 U.S.C. § 504(a). The FDIC similarly prohibits federal employment for those who have been "convicted" of a felony. *See* 12 C.F.R. § 336.4(a)(1).

[64] *See* 42 U.S.C. § 1320a-7(*i*)(1) (stating that an individual is "convicted" "when a judgment of conviction has been 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").

CONCLUSION

For the foregoing reasons, amici urge the Attorney General to reaffirm the BIA's rule that state convictions that have been vacated on the basis of a procedural or substantive defect and *nunc pro tunc* sentencing modifications must be recognized for immigration purposes.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated May 28, 2019 and subsequent order dated June 25, 2019, because the brief contains 5592 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, List of Amici, Certificate of Compliance, and Certificate of Service.

Dated: August 2, 2019

/s/ Gabriel Panek
Gabriel Panek

CERTIFICATE OF SERVICE

I, Gabriel Panek, employed by Debevoise & Plimpton LLP, attorneys for amici curiae Brooklyn District Attorney Eric Gonzalez and 42 other elected law enforcement officials herein, certify:

On the 2nd day of August 2019, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via First-Class Mail to:

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Pursuant to 28 U.S.C. § 1746, I certify under the penalty of perjury that the foregoing is true and correct.

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