Nos. 16-71196 and 21-631

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ADALBERTO ARIAS JOVEL,

Petitioner,

v.

MERRICK GARLAND, ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

Respondent.

On Petitions For Review of Orders of the Board of Immigration Appeals
(No. A092 142 072)

CONSENTED TO BRIEF OF IMMIGRANT DEFENSE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Andrew Wachtenheim
Nabilah Siddiquee
Seiko Shastri
Immigrant Defense Project
P.O. Box 1765
New York, NY 10027
Telephone: (212) 725-6421

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT AND FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E) STATEMENT

Immigrant Defense Project is a not-for-profit corporation. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

No party's counsel authored this brief in whole or in part.

No party's counsel or any other person contributed money to fund preparing or submitting this brief.

/s/*Andrew Wachtenheim*
Andrew Wachtenheim
Immigrant Defense Project

Dated: June 30, 2022

TABLE OF CONTENTS

DISCLOSURE STATEMENT i

TABLE OF CONTENTS .... ii-iii

TABLE OF AUTHORITIES .... iv-vii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The BIA's Interpretation of 8 U.S.C. § 1101(a)(48)(A) Is Not Eligible for *Chevron* Deference, Because the "Conviction" Definition Is a Criminal Law Term 4

A. Because Congress Has Sole Authority to Define Federal Criminal Offenses, the BIA Is Not Entitled to Deference When It Interprets Criminal Application Statutes 4

B. The INA's Delegation Clause Further Confirms that Congress Has Not Delegated to the BIA Authority to Interpret Criminal Laws .. 6

II. The Statutory Definition of "Conviction" Unambiguously Excludes Vacated or Expunged Prior Convictions, Consistent with Constitutional Principles and Nearly a Century of Precedent 7

A. The Terms of Art "Conviction" and "Formal Judgment of Guilt" Derive Meaning from Decades of Decisional Law that Excluded Expunged and Vacated Prior Convictions 7

B. Dictionaries in Circulation in 1996 Define the Terms "Conviction" and "Formal Judgment of Guilt" to Exclude Vacated and Expunged Convictions 12

C. Federalism Principles Make Clear that the INA Defers to State Criminal Law Determinations Regarding Whether a Prior Conviction Continues to Exist 15

D. The Structure of the INA Further Confirms Congress's Intent to Defer to the States on Questions of Criminal and Family Law ... 17

E. Any Ambiguities as to the Scope of the "Conviction" Definition Must Be Resolved in Favor of Defendants and Noncitizens under the Criminal Rule of Lenity ... 18

F. In Codifying the "Conviction" and "Formal Judgment of Guilt" Terms, Congress Did Not Rebut the Presumption Against Deportation ... 20

III. This Panel Is Not Bound by *Murillo-Espinoza v. I.N.S.*, which Did Not Consider or Decide Two Questions That Would Have Precluded Deference to *Matter of Roldan* ... 21

A. No Precedential Decision of this Court Has Conducted a Fulsome Statutory Analysis of the INA "Conviction" Definition to Determine Whether It Includes Vacated or Expunged Prior Convictions ... 22

1. *This Court must apply traditional interpretive tools before deeming the statute ambiguous* ... 22

2. *No precedential decision of this Court has conducted a fulsome statutory analysis of the "conviction" term* ... 24

B. The Agency Interpretation in *Roldan* Violates the Administrative Procedure Act because It Exceeds Statutory Authority ... 26

CONCLUSION ... 28

CERTIFICATE OF COMPLIANCE ... COC

CERTIFICATE OF SERVICE ... COS

TABLE OF AUTHORITIES

CASES

Brecht v. Abrahamson, 507 U.S. 619 (1993) 21
Bifulco v. United States, 447 U.S. 381 (1980) 5
Cardoso-Tlaseca v. Gonzales, 460 F.3d 1102 (9th Cir. 2006) 26
Cedano-Viera v. Ashcroft, 324 F.3d 1062 (9th Cir. 2003) 25
Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.,
467 U.S. 837 (1984) .... *passim*
Diaz-Quirazco v. Barr, 931 F.3d 830 (9th Cir. 2019) 26
Estrada–Rosales v. I.N.S., 645 F.2d 819 (9th Cir. 1981) 10
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 11
Gregory v. Ashcroft, 501 U.S. 452 (1991) 16, 17
Gundy v. United States, 139 S. Ct. 2116 (2019) 6, 7
Heath v. Alabama, 474 U.S. 82 (1985) 16
I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 3, 20
I.N.S. v. St. Cyr, 533 U.S. 289 (2001) 1, 3
Kisor v. Wilkie, 139 S. Ct. 2400 (2019) 24
Judulang v. Holder, 565 U.S. 42 (2011) 27
Leocal v. Ashcroft, 543 U.S. 1 (2004) 20
Lopez-Valencia v. Lynch, 798 F.3d 863 (9th Cir. 2015) 18
Lujan-Armendariz v. I.N.S., 222 F.3d 728 (9th Cir. 2000) 25
Mathis v. United States, 136 S. Ct. 2243 (2016) 1
Murillo-Espinoza v. I.N.S., 261 F.3d 771 (9th Cir. 2001) 21, 22, 23, 24, 25
Nat'l Res. Def. Council v. U.S. Dep't of Interior,
113 F.3d 1121 (9th Cir. 1997) 27
Nath v. Gonzales, 467 F.3d 1185 (9th Cir. 2006) 26
Navarro v. Mukasey, 518 F.3d 729 (9th Cir. 2008) 21
Northwest Envtl. Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008) 27
Nunez-Reyes v. Holddder, 646 F.3d 684 (9th Cir. 2011) (en banc) 25

Oregon Restaurant and Lodging Ass'n v. Perez, 816 F.3d 1080 (9th Cir. 2016)..... 2
Padilla v. Kentucky, 559 U.S. 356 (2010) 1
Pereida v. Wilkinson, 141 S. Ct. 754 (2021) 1
Pereira v. Sessions, 138 S. Ct. 2105 (2018) 23, 24
Poblete-Mendoza v. Holder, 606 F.3d 1137 (9th Cir. 2010) 25
Pom Wonderful LLC v. Coca–Cola Co., 134 S. Ct. 2228 (2014)............................ 5
Prado v. Barr, 949 F.3d 438 (9th Cir. 2020)... 25, 26
Ramirez-Castro v. I.N.S., 287 F.3d 1172 (9th Cir. 2002)................................ 25
Retuta v. Holder, 591 F.3d 1181 (9th Cir. 2010)...................................... 12, 20
Reyes-Torres v. Holder, 645 F.3d 1073 (9th Cir. 2011).................................... 26
Reyes v. Lynch, 834 F.3d 1104 (9th Cir. 2016) 26
Trump v. Hawaii, 138 S. Ct. 2392 (2018) 7
United States v. Bass, 404 U.S. 336 (1971)... 16, 19
United States v. Cassel, 408 F.3d 622 (9th Cir. 2005).. 21
United States v. Davis, 139 S. Ct. 2319 (2019) 6
United States v. Kirilyuk, 29 F.4th 1128 (9th Cir. 2022)............................. 13, 21
United States v. Lopez, 514 U.S. 549 (1995).. 16
United States v. Millis, 621 F.3d 914 (9th Cir. 2010).. 19
United States v. Morrison, 529 U.S. 598 (2000) 15, 16
United States v. Prasad, 18 F.4th 313 (9th Cir. 2021) 13
United States v. Rodriguez-Vega, 797 F.3d 781 (9th Cir. 2015) 1
United States v. Taylor, 142 S. Ct. 2015 (2022).. 17
United States v. Thompson/Ctr. Arms Co., 504 U.S. 505 (1992) 5, 19
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952).................... 19
Valenzuela Gallardo v. Barr, 968 F.3d 1053 (9th Cir. 2020) 6, 25
Velasquez-Rios v. Barr, 979 F.3d 690 (9th Cir. 2020) 26
Whalen v. United States, 445 U.S. 684 (1980) 5
Wiedersperg v. I.N.S., 896 F.2d 1179 (9th Cir. 1990)... 10
Williams v. Taylor, 529 U.S. 420 (2000)... 11

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007) 12
Ysleta Del Sur Pueblo v. Texas, No. 20-493, 2022 WL 2135494 (U.S. June 15, 2022).. 13

AGENCY CASES

Matter of A-F-, 8 I. & N. Dec. 429 (BIA 1959) 8
Matter of G-, 9 I. & N. Dec. 159 (BIA 1960, A.G. 1961) 8, 9
Matter of Gutnik, 13 I. & N. Dec. 672 (BIA 1971) 8, 9
Matter of Ibarra-Obando, 12 I. & N. Dec. 576 (BIA 1966, A.G. 1967).............. 8, 9
Matter of Ozkok, 19 I. & N. Dec. 546 (BIA 1988) .... *passim*
Matter of Pickering, 23 I. & N. Dec. 621 (BIA 2003) .... *passim*
Matter of Roldan, 22 I. & N. Dec. 512 (BIA 1999) .... *passim*
Matter of Sirhan, 13 I. & N. Dec. 592 (BIA 1970) 8

STATUTES

5 U.S.C. § 706(2) 4, 22, 27, 28
8 U.S.C. § 1101(a)(27)(J)(i)-(ii) 18
8 U.S.C. § 1101(a)(43) 6
8 U.S.C. § 1101(a)(48) .... *passim*
8 U.S.C. § 1101(a)(48)(A) .... *passim*
8 U.S.C. § 1101(a)(48)(B) 12, 18
8 U.S.C. § 1103... 6, 28
8 U.S.C. § 1103(a) 6, 7
8 U.S.C. § 1103(b) 7
8 U.S.C. § 1103(g) 6,7
8 U.S.C. § 1184(p)(1) 18
8 U.S.C. § 1229a(c)(3)... 18
8 U.S.C. § 1326(a) 4
8 U.S.C. § 1326(b) 4
Cal. Penal Code § 1203.4 8

OTHER AUTHORITIES

Antonin Scalia & Bryan Garner,
Reading Law: The Interpretation of Legal Texts (2012)....................................11

Ballentine's Legal Dictionary and Thesaurus (1995)..15

Black's Law Dictionary (6th ed. 1990)...13, 14

H.R. Conf. Rep. No.104-828 (1996) 12

Philip L. Torrey, *Principles of Federalism and Convictions for Immigration Purposes*, 36 Immigr. & Nat'y L. Rev. 3 (2016) 8

Merriam Webster's Dictionary of Law (1996) 14, 15

Random House Compact Unabridged Dictionary (Special 2d ed. 1996)...............15

The Oxford Dictionary and Thesaurus (Am. ed. 1996)...15

The Oxford Encyclopedic English Dictionary (2d ed. 1995)................................15

The Oxford English Reference Dictionary (2d ed. 1996).......................................14

The Plain-Language Law Dictionary
(2d ed., newly rev. & expanded 1996) 14, 15

Webster's New World Dictionary and Thesaurus (1996) 14, 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. X, § 8 16

INTEREST OF *AMICUS CURIAE*

Amicus 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.[1] IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice and resources.

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. IDP has filed briefs as amicus curiae on similar issues before the U.S. Supreme Court, this Court and the federal courts of appeals, the Board of Immigration Appeals, and various international tribunals. *See, e.g.*, *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021); *Mathis v. United States*, 579 U.S. 500 (2016); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322-23 (2001) (citing IDP brief); *United States. v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015).

[1] *Amicus curiae* state that no party or its counsel has authored this brief in whole or in part, no person or entity other than *amicus* have made any monetary contribution to its preparation, this brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

For over two decades, the Board of Immigration Appeals (BIA or Board) has wrongly and impermissibly interpreted the definition of "conviction" and related term "formal judgment of guilt" in the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(48)(A), to include prior state convictions that have been eliminated by state expungement and vacatur decisions. *See Matter of Roldan*, 22 I. & N. 512 (BIA 1999) (en banc); *Matter of Pickering*, 23 I. & N. 621 (BIA 2003). *Amicus* IDP agrees with Petitioner that these decisions are incorrect, unauthorized interpretations of the INA, that they violate the Administrative Procedure Act, 5 U.S.C. § 706(2), and that they must be overruled as contrary to statute and the U.S. Constitution. *See* Petr's Br. at 54-56.

Amicus IDP respectfully submits this brief to assist this Court with its review of these important aspects of Petitioner's argument and to urge this Court to overrule *Roldan* and *Pickering* as contrary to statute and the U.S. Constitution.

In Section I, *amicus* addresses the *Chevron* "step zero" question—"whether the *Chevron* framework applies at all," *Oregon Restaurant and Lodging Ass'n v. Perez*, 816 F.3d 1080, 1086 (9th Cir. 2016)—which no published decision of this Court has done with respect to the "conviction" definition. *Amicus* explains that the "conviction" definition is a term with both civil and criminal application and therefore ineligible for *Chevron* deference.

In Section II, in accordance with *Chevron*'s mandate[2], *amicus* carefully reviews the plain text of the INA, its legislative history, and statutory interpretation tools, all of which unambiguously confirm that Congress codified the "conviction" definition (and the related term "formal judgment of guilt") to defer to state court expungement and vacatur orders. While *amicus* submits that the *Chevron* framework is inapplicable, if this Court were to apply the *Chevron* framework, these tools would be applied at *Chevron* step one, before considering deference to the agency's interpretation at step two. *See id.*[3]

In Section III, *amicus* explains that the panel in this case may—in fact, must—conduct a full statutory analysis of the "conviction" definition, which this Court has not yet done with respect to expungements and vacaturs of formal judgments of guilt. Nor has this Court decided the *Chevron* step zero question. *Amicus* further argues that the Board's precedents expanding the "conviction"

[2] "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

[3] The Supreme Court applies traditional tools of statutory construction at *Chevron* step one, before considering deference to an agency's interpretation of a statute. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987) ("[e]mploying tools of statutory construction" to ascertain intent of Congress in INA provisions and citing *Chevron*, 467 U.S. at 843 n.9); *I.N.S. v. St. Cyr*, 533 U.S. 289, 319 n.45 (2001) (applying presumption against retroactivity to conviction-related provision of INA, former section 212(c), to find no ambiguity).

definition beyond congressional intent violate the Administrative Procedure Act. *See* 5 U.S.C. §§ 706(2)(A), (C).

ARGUMENT

I. The BIA's Interpretation of 8 U.S.C. § 1101(a)(48)(A) Is Not Eligible for *Chevron* Deference, Because the "Conviction" Definition Is a Criminal Law Term.

The framework for *Chevron* deference does not apply to § 1101(a)(48)(A) because it is a criminal application statute. This provision defines "conviction," which is an element of federal crimes and sentencing enhancement. Section 1326(a) makes it a crime to "enter[], attempt[] to enter, or . . . at any time [be] found, in the United States" after previous removal. 8 U.S.C. § 1326(a). A noncitizen may be sentenced to a maximum of two years for this offense, but that sentencing maximum increases to ten and twenty years if the noncitizen defendant was removed subsequent to "conviction" for designated misdemeanors or an aggravated felony. *Id.* §§ 1326(a), (b)(1)-(2). The INA thus attaches "criminal penalties" based on the definition of "conviction" at § 1101(a)(48)(A). *Id.* § 1326(b). As a result, this Court performs independent statutory interpretation of the "conviction" definition rather than under the *Chevron* deference framework.

A. Because Congress Has Sole Authority to Define Federal Criminal Offenses, the BIA Is Not Entitled to Deference When It Interprets Criminal Application Statutes.

"[W]ithin our federal constitutional framework . . . the power to define criminal offenses and to prescribe the punishments to be imposed . . . resides wholly with the Congress." *Whalen v. United States*, 445 U.S. 684, 689 (1980). Courts must be certain of congressional intent before interpreting a statute in a manner that would expand criminal liability or deprivation of liberty. *See Bifulco v. United States*, 447 U.S. 381, 387–88 (1980) ("[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." (quotations omitted)).

The same principle applies to agency interpretations of statutes that have both criminal and civil applications. *See Pom Wonderful LLC v. Coca–Cola Co.*, 134 S. Ct. 2228, 2236 (2014) ("[T]his is a statutory interpretation case and the Court relies on traditional rules of statutory interpretation. That does not change because . . . . an agency is involved. Analysis of the statutory text, aided by established principles of interpretation, controls." (citation omitted)). In such cases, *Chevron* deference is not applicable. *See, e.g., United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality).

A panel of this Court recently recognized this principle with respect to a different dual-application term in the INA—the term "aggravated felony"—but was unable to hold accordingly due to the "law of the case" doctrine in that

individual case.[4] *See Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1059–62 (9th Cir. 2020) (addressing the INA term "aggravated felony," 8 U.S.C. § 1101(a)(43), but not "conviction"). Nevertheless, the panel wrote: "Deferring to the BIA's construction of a statute with criminal applications raises serious constitutional concerns. Because '[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws,' permitting executive officials to define the scope of criminal law could offend the doctrine of separation of powers." *Id.* at 1059 (quoting *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019)); *see also Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (observing it would be profoundly unfair "[t]o allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing").

B. The INA's Delegation Clause Further Confirms that Congress Has Not Delegated to the BIA Authority to Interpret Criminal Laws.

The INA's delegation clause, 8 U.S.C. § 1103, assigns to the Attorney General and Secretary of Homeland Security the charge of "administration and enforcement" of the INA and "all other laws relating to the *immigration and naturalization*" of noncitizens. 8 U.S.C. §§ 1103(a)(1), (g)(1) (emphasis added).

[4] The panel found it was "not free to take a fresh look at the *Chevron* Step Zero question" because a prior panel in the petitioner's case had squarely addressed the issue. *Id*. at 1062.

The clause does not delegate any criminal lawmaking authority. *See* §§1103(a)-(b). Subsection (g) further circumscribes the scope of Congress' delegation to "authorities and functions . . . relating to the immigration and naturalization of [noncitizens] as were exercised by the Executive for Immigration Review," an agency with jurisdiction only over civil immigration proceedings. *Id.* § 1103(g)(1).

The concluding catchall provision, that the Attorney General may "perform such acts as the Attorney General determines necessary for carrying out this section," is wholly insufficient to include a delegation as substantial as creating the elements of a criminal offense. *Id.* § 1103(g)(2); *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2409-10 (2018) (acknowledging a "textual limit" to INA delegation clauses, but finding in a separate context that the challenged delegation fell within the scope of authority); *Gundy*, 139 S. Ct. at 2123–25 ("[T]he Attorney General's discretion extends only to considering and addressing feasibility issues . . . . [b]ut no more than that.").

II. The Statutory Definition of "Conviction" Unambiguously Excludes Vacated or Expunged Prior Convictions, Consistent with Constitutional Principles and Nearly a Century of Precedent.

A. The Terms of Art "Conviction" and "Formal Judgment of Guilt" Derive Meaning from Decades of Decisional Law that Excluded Expunged and Vacated Prior Convictions.

For decades prior to 1999, the BIA, Attorneys General, and federal courts deferred in almost all contexts to a state convicting court's determination as to

whether a conviction exists or not. *See* Philip L. Torrey, *Principles of Federalism and Convictions for Immigration Purposes*, 36 Immigr. & Nat'y L. Rev. 3, 9–17 (2016). The Board repeatedly held that a prior conviction that was expunged, vacated, or no longer existed under state law was not a "conviction" for immigration purposes and could not serve as the basis for deportation. *See Matter of G-*, 9 I. & N. Dec. 159, 160 (BIA 1960; A.G. 1961) (holding that a conviction expunged under California Penal Code § 1203.4 is not a conviction and cannot serve as basis for deportation)[5]; *Matter of Sirhan*, 13 I. & N. Dec. 592, 599-600 (BIA 1970) (holding that where a court vacated prior convictions, "no convictions exist," and stating that "when a court acts within its jurisdiction and vacates an original judgment of conviction, its action must be respected"); *but see Matter of A-F-*, 8 I. & N. Dec. 429 (BIA 1959) (creating a narrow exception for certain narcotics convictions).

In 1988, the Board published *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988), which slightly modified the Board's decisional law regarding withheld adjudications and was the last significant agency precedent addressing the definition of "conviction" prior to the 1996 codification. *Ozkok* defined two categories of "convictions": first, "where a court has adjudicated [a person] guilty

---

[5] *See also, e.g.*, *Matter of Ibarra-Obando*, 12 I. & N. Dec. 576, 579–80 (BIA 1966; A.G. 1967) (upholding *Matter of G-*); *Matter of Gutnick*, 13 I. & N. Dec. 672, 673 (BIA 1971) (applying the same rule with respect to Arizona expungement statute).

or has entered a formal judgment of guilt"; and second, a withheld adjudication that meets three requirements:

> (1) a judge or jury has found the [noncitizen] guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
> (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed . . . . and
> (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.

Ozkok, 19 I. & N. Dec. at 551-52. The Board explicitly clarified that in modifying the immigration law standard for withheld adjudications, it was not departing from its longstanding precedent recognizing the effect of expungements:

> We note that a conviction for a crime involving moral turpitude may not support an order of deportation if it has been expunged. We shall continue in this regard to follow the rule which was set forth by the Attorney General in *Matter of G—*, *supra*, and subsequently reaffirmed in *Matter of Ibarra—Obando*, 12 I&N Dec. 576 (BIA 1966; A.G. 1967), and *Matter of Gutnick*, 13 I&N Dec. 672 (BIA 1971).

Id. at 552. Indeed, the Board's discussion highlights its understanding that convictions that are entered and later expunged or vacated (as in *Matter of G-* and similar cases) are distinct from the question of whether a withheld adjudication constitutes a "conviction" for immigration purposes.

During this period, the Ninth Circuit also held that vacated convictions were not convictions for immigration purposes and could not serve as a basis for deportability. *See, e.g.*, *Estrada–Rosales v. I.N.S.*, 645 F.2d 819, 821 (9th Cir. 1981) (holding that a conviction invalidated through vacatur could not be the basis of deportation); *Wiedersperg v. I.N.S.*, 896 F.2d 1179, 1181 (9th Cir. 1990) (holding vacated conviction could not be grounds for deportability). In *Wiedersperg*, the court explained that this rule made sense in part because Congress made immigration consequences dependent on state-defined convictions and crimes:

> Here Wiedersperg's state law conviction was the ground of deportability and state law properly applies to the validity of the conviction. Where Congress has made deportability depend upon a state's action in convicting an alien of a state-defined crime, it offends no sense of symmetry to hold that a state's action vacating and totally nullifying that conviction should render the deportation not legally executed.

Wiedersperg, 896 F.2d at 1182.

In 1996, Congress codified a definition of "conviction." *See* 8 U.S.C. § 1101(a)(48)(A).[6] In doing so, Congress adopted *Ozkok*'s first category of "formal

---

[6] The definition provides:

> The term "conviction" means, with respect to [a noncitizen], a formal judgment of guilt of the [noncitizen] entered by a court or, if adjudication of guilt has been withheld, where—

judgment of guilt" verbatim. Congress only modified the second category of withheld adjudications, eliminating the third prong of *Ozkok*'s tripartite test for withheld adjudications. *Compare* 8 U.S.C. § 1101(a)(48)(A), *with Ozkok*, 19 I. & N. Dec. at 551–52.

It is a well-settled interpretive principle that when Congress adopts language from authoritative decisional law, it is presumed that Congress also intended to import the judicial and administrative interpretations of that language, absent clear indication to the contrary. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) ("[W]ords or phrases that have already received authoritative construction by" a court or "responsible administrative agency" are "understood according to that construction."); *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (explaining that "[w]hen the words of the Court are used in a later statute governing the same subject matter," courts should "give the words the same meaning in the absence of specific direction to the contrary"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144–46 (2000) (discussing Congress's incorporation of prior agency action by Food and Drug Administration

---

(i) a judge or jury has found the alien guilty or the [noncitizen] has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

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

8 U.S.C. § 1101(a)(48)(A).

into subsequently codified statute); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90–91 (2007) (noting Congress adopted language originally drafted by the Secretary of Education without amendment and crediting this as evidence Congress did not intend to disturb the agency's prior interpretation). Subsequent to the codification of 8 U.S.C. §§ 1101(a)(48)(A)-(B), the government itself has continued to rely on *Ozkok*'s framework as good law. *See, e.g.*, *Retuta v. Holder*, 591 F.3d 1181, 1186-87 (9th Cir. 2010).

Relevant legislative history further confirms that Congress intended only to modify these terms of art with respect to withheld adjudications. *See* H.R. Conf. Rep. No.104-828, at 223–24 (1996). The Congressional Committee Conference Report states that *Ozkok* "does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the [noncitizen's] good behavior." *Id.* It continues: "This new provision, by removing the third prong of *Ozkok*, clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws." *Id.* This legislative history leaves no doubt that in codifying the terms of art from *Ozkok*, Congress intended only to modify the standard for when a withheld adjudication constitutes a "conviction." Congress did not modify the decades of decisional law giving full effect to state court expungements and vacaturs.

B. Dictionaries in Circulation in 1996 Define the Terms "Conviction" and "Formal Judgment of Guilt" to Exclude Vacated and Expunged Convictions.

The Supreme Court and this Court routinely consult legal and plain language dictionaries to identify congressional intent. *See, e.g.*, *Ysleta Del Sur Pueblo v. Texas*, No. 20-493, 2022 WL 2135494, at *7 (U.S. June 15, 2022) (consulting Webster's Third International, Oxford English, and Black's Law dictionaries); *United States v. Prasad*, 18 F.4th 313, 319 (9th Cir. 2021) (consulting Oxford English and Black's Law dictionaries); *see also United States v. Kirilyuk*, 29 F.4th 1128, 1137 (9th Cir. 2022) ("consulting dictionary definitions" as one of the "ordinary tools of statutory interpretation"). Dictionaries in circulation at the time Congress adopted 8 U.S.C. § 1101(a)(48)(A) reflect an understanding that the terms "conviction" and "formal judgment of guilt" did not include prior dispositions eliminated through vacatur or expungement.

The 1996 Black's Law Dictionary identified the meaning of the term "judgment" as:

> The final decision of the court resolving the dispute and determining the rights and obligations of the parties. The law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceeding.

Black's Law Dictionary 841-42 (6th ed. 1990). A formal judgment of guilt that has been vacated clearly is not the "final decision of the court," nor is it the "last word"

or "final determination" of rights—by definition, a vacated judgment has been superseded by a subsequent judgment. The same edition of Black's identified that "vacate" means: "To render an act void; as, to vacate an entry of record, or a judgment." *Id.* at 1548. "Expunge" means: "To destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information—including criminal records—in files, computers, or other depositories." *Id.* at 582.[7]

Ordinary meaning dictionaries further confirm this reading. The Plain Language Law Dictionary defined "judgment" as "the decision of a court having the appropriate jurisdiction to have tried the case; the final determination of a case." The Plain-Language Law Dictionary 254 (2d ed., newly rev. & expanded 1996) (capitalization removed). Several dictionaries define "judgment" as akin to "[a] formal decision or determination on a matter or case by a court." Merriam Webster's Dictionary of Law 268 (1996). *See also, e.g.*, The Oxford English Reference Dictionary 765 (2d ed. 1996) ("the sentence of a court of justice; a decision by a judge"); Webster's New World Dictionary and Thesaurus 337 (1996) ("a legal decision; order given by a judge, etc.").

---

[7] Black's defined "formal" to mean, "Relating to matters of form," id. at 652, and "guilt" to mean, "In criminal law, that quality which imparts criminality to a motive or act, and renders the person amenable to punishment by the law." Id. at 708.

"Expunge" was commonly understood to mean "obliterate," Plain-Language at 178, "erase," or "remove." The Oxford Dictionary and Thesaurus 11 (Am. ed. 1996). *See also* Merriam Webster's Dictionary of Law 181 (1996) ("to cancel out or destroy completely"); Random House Compact Unabridged Dictionary 683 (Special 2d ed. 1996) ("wipe out or destroy"). "Vacatur" or "vacate" was commonly understood to mean "annul" or "void." Ballentine's Legal Dictionary and Thesaurus 697 (1995); *see also* The Oxford Encyclopedic English Dictionary 1593 (2d ed. 1995); Random House Compact Unabridged Dictionary 2100 (Special 2d ed. 1996) ("to render inoperative; deprive of validity; void; annul: *to vacate a legal judgment*"); Webster's New World Dictionary and Thesaurus 679 (1996). *See also Vacating a judgment*, Plain-Language at 511 ("[c]ancelling or rescinding a court decision (judgment)" (capitalization removed).

These dictionaries confirm that, at the time Congress codified the "conviction" definition, the terms "conviction" and "formal judgment of guilt" unambiguously did not include prior judgments that had been eliminated through vacatur or expungement.

C. Federalism Principles Make Clear that the INA Defers to State Criminal Law Determinations Regarding Whether a Prior Conviction Continues to Exist.

The Constitution's reservation of a generalized police power to the States "is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S.

598, 618 n.8 (2000) (quotations omitted); *see* U.S. Const. amend. X, § 8 (reserving for the States any powers not specifically enumerated to the federal government). A state's power to define criminal offenses and punishment squarely falls within the historic police power. *See Morrison*, 529 U.S. at 617-18 (describing regulation of crime as a prime example of state police power reserved for the States). Consistent with these federalism principles, the States are sovereign with respect to defining and enforcing their own criminal laws, including laws defining convictions and sentencing. *See 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.") (quotations omitted); *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (explaining that "each State's power to prosecute is derived from its own 'inherent sovereignty,' not the Federal Government").

It is a well-established principle of federalism that Congress's ability to regulate in an area of traditional state concern "is an extraordinary power" that courts "must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). States' police power over traditional domains may not be disturbed absent an "unmistakably clear" statement of intent from Congress. *Id.* at 460. "[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress

conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”).

Section 1101(a)(48)(A) directly implicates the traditional realm of state sovereignty over criminal laws, since it defines which state criminal court dispositions constitute “convictions” and then attaches legal consequences to that designation. In drafting the definition, Congress did not state any intention to shift the balance as to the States’ power to define criminal laws with respect to vacated or expunged prior convictions. *See supra* Section II.A. To the contrary, by requiring a state criminal court’s “conviction,” Congress continued to make immigration consequences of a criminal case dependent on the state’s adjudication of the criminal case. *See* 8 U.S.C. § 1101(a)(48) (requiring adjudication by a state court judge or jury for a disposition to qualify as a “conviction”). Such silence falls far short of the “unmistakably clear” statement of intent needed in order to encroach on state police powers. *See Gregory*, 501 U.S. at 460 (outlining clear statement doctrine).

D. The Structure of the INA Further Confirms Congress’s Intent to Defer to the States on Questions of Criminal and Family Law.

The INA explicitly defers to and incorporates state law determinations in matters of criminal and family law. *Cf. United States v. Taylor*, 142 S. Ct. 2015 (2022) (“Appreciating the respect due state courts as the final arbiters of state law in our federal system, this Court reasoned that it made sense to consult how a state

court would interpret its own State's laws."). At least three parts of the INA provide useful examples.

First, the INA relies on the States to define the elements of state criminal laws. *See Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015). The INA also relies on state criminal court documents to prove the existence of a conviction. *See* 8 U.S.C. § 1229a(c)(3). The "conviction" and "sentence" definitions rely on "formal judgment[s] of guilt" rendered by state courts and sentences ordered by a state "court of law." *Id.* §§ 1101(a)(48)(A), (B).

Second, immigration law also relies on state court determinations to confer Special Immigrant Juvenile Status. *See* 8 U.S.C. § 1101(a)(27)(J)(i)-(ii) (for immigration benefit to confer, young person must be "declared dependent on a juvenile court located in the United States", and it must have been "determined in administrative or judicial proceedings that it would not be in the [young person]'s best interest to be returned to" their "previous country").

Third, state agency and court determinations of crime victim helpfulness are also binding on federal immigration U Nonimmigrant Status adjudications. *See* 8 U.S.C. § 1184(p)(1) (the petition "shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity").

Federal immigration law operates to defer to state law on matters to which the States are closest, such as criminal convictions and sentencing. State conviction vacaturs and expungements are no exception.

E. Any Ambiguities as to the Scope of the "Conviction" Definition Must Be Resolved in Favor of Defendants and Noncitizens under the Criminal Rule of Lenity.

The rule of lenity is the longstanding principle that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 348–49. It is a "time-honored" rule of statutory interpretation. *Crandon v. United States*, 494 U.S. 152, 158 (1990) (quoting another source). "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is *clear and definite*." *Bass*, 404 U.S. at 347–48 (emphasis added) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)); *see also United States v. Millis*, 621 F.3d 914, 916–17 (9th Cir. 2010) ("[T]he rule of lenity requires courts to limit the reach of criminal statutes to the clear import of their text and construe any ambiguity against the government." (quotations omitted)).

The Supreme Court has confirmed the application of the rule of lenity to civil statutes that have criminal application, including the INA. *See, e.g.*, *Thompson/Center Arms Co.*, 504 U.S. at 517-18, 518 n.10 (applying rule of lenity

to a tax statute with both criminal and civil application, noting the statute must have only one meaning); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (noting that the rule of lenity applies to a criminal statute that has both criminal and noncriminal application—including in the deportation context—and requires the Court "to interpret any ambiguity in the statute in petitioner's favor").

Because § 1101(a)(48)(A) has both criminal and civil application, *see supra* Section I, any ambiguities would be resolved in favor of noncitizens and defendants under the rule of lenity. In this case, the rule forecloses a reading of the definition that includes vacated and expunged convictions, because such an interpretation vastly expands the reach of the statute's criminal application by including court dispositions that are not convictions under state law. As this Court has explained, "[I]f we were to view the statute as ambiguous, we would think it our duty to resolve the ambiguity favorably to the [noncitizen], pursuant to the principle of lenity applicable with respect to the gravity of removal." *Retuta v. Holder*, 591 F.3d 1181, 1189 (9th Cir. 2010).

F. In Codifying the "Conviction" and "Formal Judgment of Guilt" Terms, Congress Did Not Rebut the Presumption Against Deportation.

As with the criminal rule of lenity, ambiguities in the INA are resolved in favor of noncitizens under the presumption against deportation (or immigration rule of lenity). *See Cardoza-Fonseca*, 480 U.S. at 449 (describing "the

longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]”). The Supreme Court and federal courts apply the presumption against deportation when analyzing removability and bars to relief from removal based on convictions. *See supra* note 2; *Navarro v. Mukasey*, 518 F.3d 729, 735-36 (9th Cir. 2008) (“[B]ecause of the harsh consequences that attach to removal of a [noncitizen] from the United States, we have held that doubts in interpretation should be resolved in favor of the [noncitizen].”). Here, the presumption against deportation operates to preclude the Board’s interpretations in *Roldan* and *Pickering*.

III. This Panel Is Not Bound by *Murillo-Espinoza v. I.N.S.*, which Did Not Consider or Decide Two Questions That Would Have Precluded Deference to *Matter of Roldan*.

Prior precedent that does not “squarely address” a particular issue does not bind later panels on the question. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). And further, “cases are not precedential for propositions not considered, or for matters that are simply assumed.” *Kirilyuk*, 29 F.4th at 1134 (quotations omitted). As this Court has explained, “if a prior case does not ‘raise or consider the implications’ of a legal argument, it does ‘not constrain our analysis.’” *Id.* (quoting *United States v. Cassel*, 408 F.3d 622, 633 n.9 (9th Cir. 2005)).

A prior panel of this Court in *Murillo-Espinoza v. I.N.S.* considered whether the “conviction” definition at § 1101(a)(48)(A) includes prior convictions that have

been expunged. 261 F.3d 771, 773 (9th Cir. 2001). The panel found the statutory definition silent as to expungement and deferred to the Board's interpretation in *Roldan*. However, the panel found the statute ambiguous based *only* on its plain language. Without any further statutory analysis, the court proceeded to *Chevron* step two to find the Board's interpretation reasonable. *See Murillo-Espinoza*, 261 F.3d at 774.

Murillo-Espinoza did not decide at least two key preliminary questions that, had it done so, would have precluded the panel's conclusion that the statutory terms are ambiguous and that *Chevron* deference was appropriate. First, the panel did not address whether *Chevron* deference is available to agency interpretations of criminal laws or, if *Chevron* does apply, whether application of additional statutory interpretation tools was required to try to identify unambiguous congressional intent before proceeding to *Chevron* step two. Second, the panel did not address or decide whether *Roldan* violates the Administrative Procedure Act by being in excess of statutory authority and not in accordance with law. *See* 5 U.S.C. § 706(2)(A), (C).

Because no panel of this Court has decided these essential questions, this Court must now do so and conclude that the "conviction" term does not include prior convictions that no longer exist due to expungement, vacatur, or a similar measure.

A. No Precedential Decision of this Court Has Conducted a Fulsome Statutory Analysis of the INA "Conviction" Definition to Determine Whether It Includes Vacated or Expunged Prior Convictions.

1. *This Court must apply traditional interpretive tools before deeming the statute ambiguous.*

The Supreme Court has instructed that courts reviewing administrative agency action must first try to identify whether Congress has spoken directly to the question at issue, applying tools of statutory interpretation, before considering deference to the agency. *See supra* note 2 (collecting cases).

Recently, the Court has reaffirmed and strengthened this requirement in notable immigration cases. In *Pereira v. Sessions*, an eight-Justice majority applied a full statutory analysis to reject the decisions of six courts of appeals that had deferred to the Board at *Chevron* step two. 138 S. Ct. 2105, 2113-14, 2113 n.4 (2018). The Court found it "need not resort to *Chevron* deference," as Congress "has supplied a clear and unambiguous answer to the interpretive question[.]" *Id.* at 2113-14 (consulting multiple INA provisions, Black's Law Dictionary, and statutory construction principles). Justice Kennedy's concurrence noted that some of the decisions of the courts of appeals, by "engag[ing] in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned," and instead exhibiting "reflexive deference" to the BIA,

failed to perform the court's role in interpreting federal statutes. *Id.* at 2120-21 (Kennedy, J., concurring).

In *Kisor v. Wilkie*, the Court discussed review of agency interpretation of regulations and cited *Chevron*'s approach to statutory interpretation, explaining that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9). The Court further explained that "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." *Id.* at 2415 (stating courts must consider "the text, structure, history, and purpose of a regulation" before finding ambiguity).

2. *No precedential decision of this Court has conducted a fulsome statutory analysis of the "conviction" term.*

The "conviction" term has a long history with this Court, and yet no precedential opinion has conducted a complete statutory analysis of 8 U.S.C. § 1101(a)(48)(A) with respect to vacated or expunged convictions.

In 2001, this Court decided *Murillo-Espinoza*, treating (but not explicitly finding) the "conviction" term as ambiguous and finding the Board's construction in *Roldan* reasonable at *Chevron* step two. 261 F.3d at 774. The court reviewed the plain text and observed that it "said nothing about expungement, and could well be interpreted to establish only *when* a conviction occurred without determining what might be the effect of a later expungement." *Id.*

Several published and unpublished decisions of this Court cite to or apply *Murillo-Espinoza*'s holding that *Roldan* is an affirmed agency interpretation in the Ninth Circuit. *See, e.g.*, *Prado v. Barr*, 949 F.3d 438, 441 (9th Cir. 2020); *Poblete-Mendoza v. Holder*, 606 F.3d 1137, 1141 (9th Cir. 2010); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003); *Ramirez-Castro v. I.N.S.*, 287 F.3d 1172, 1174 (9th Cir. 2002). None decides the *Chevron* step zero question or conducts its own full statutory analysis at *Chevron* step zero or step one.[8]

Several cases that repeat *Murillo-Espinoza*'s deference holding did not involve expungements or vacaturs at all, did not involve expungements or vacaturs of formal judgments of guilt, or involved a different set of legal questions altogether. *See, e.g.*, *Ramirez-Castro*, 287 F.3d at 1175 (rejecting a difference between felony and misdemeanor expungements, and rejecting asserted differences between Arizona and California expungement measures); *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc), *overruling Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000) (rejecting an "equal protection" challenge to differential treatment between "an expunged state conviction of a drug crime" and a "federal drug conviction that has been expunged under the" Federal First

[8] *Cf. Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1061 (2020) (noting the difference between "assum[ing] that the *Chevron* framework applie[s]" and "explicitly address[ing] whether *Chevron* deference is constitutionally permissible in the context of dual application statutes").

Offender Act); *Reyes v. Lynch*, 834 F.3d 1104, 1105-08, n.16 (9th Cir. 2016) (holding that an expunged "withheld adjudication" fell within the "conviction" definition, but not addressing expungement of a "formal judgment of guilt"); *Prado*, 949 F.3d at 440-42 (evaluating a state "redesignat[ion]" from felony to misdemeanor, but not expungement or vacatur).

Velasquez-Rios v. Barr did not construe the "conviction" definition at all. 979 F.3d 690, 694 (9th Cir. 2020). In *Diaz-Quirazco v. Barr*, the first question the panel addressed did not involve the "conviction" definition, and the second question did not involve vacaturs or expungements. 931 F.3d 830, 843-45 (9th Cir. 2019).

Regarding *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), this Court has applied the Board's holding that the conviction term excludes prior convictions vacated due to "substantive" or "procedural" defect. *See, e.g.*, *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006). However, no panel of this Court has reviewed and expressly deferred to *Pickering*'s distinction between categories of vacatur. *See, e.g.*, *Nath v. Gonzales*, 467 F.3d 1185, 1188–89 (9th Cir. 2006) (applying the Board's vacatur rule in *Pickering* without analysis of § 1101(a)(48)(A) and without discussing *Chevron* deference); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077–78 (9th Cir. 2011) (same).

B. The Agency Interpretation in *Roldan* Violates the Administrative Procedure Act because It Exceeds Statutory Authority.

The BIA's decisions extending the statutory definition of "conviction" to include convictions eliminated by state and federal courts are in violation of the Administrative Procedure Act, because they exceed statutory authority and are "not in accordance with law." 5 U.S.C. § 706(2)(A), (C); *see Judulang v. Holder*, 565 U.S. 42, 52 n.7, 53 (2011) (reviewing BIA action under APA § 706(2)(A)).

First, *Roldan* and *Pickering* are "not in accordance with law" under § 706(2)(A), because those decisions impermissibly expand 8 U.S.C. § 1101(a)(48)(A) beyond what Congress intended. Nothing in the text of the statute or legislative history suggests that Congress intended to include vacated or expunged convictions in the INA definition, *see supra* Section II.A. To the contrary, legislative history confirms that Congress explicitly intended to adopt decades of prior decisional law, which repeatedly had recognized the effect of state court post-conviction vacatur and expungement. *See supra* Section II.A. The Board's interpretation to the contrary must be set aside as inconsistent with the statute and contrary to clear congressional intent. *See Nat'l Res. Def. Council v. U.S. Dep't of Interior*, 113 F.3d 1121, 1226-27 (9th Cir. 1997) (finding agency's "expansive construction" of statutory language contravened Congressional intent and holding agency's action violated APA § 706(2)(A)).

Second, the Board's decisions in *Roldan* and *Pickering* exceed the agency's statutory authority. *See* 5 U.S.C. § 706(2)(C); *Northwest Envtl. Advocates v. EPA*,

537 F.3d 1006, 1014 (9th Cir. 2008) ("Under 5 U.S.C. § 706(2)(C) . . . we must 'set aside agency action' that is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'"). Congress has not delegated to the BIA any authority to interpret laws with criminal law application, such as 8 U.S.C. § 1101(a)(48)(A). *See supra* Sections I.A–I.B. The Board's decisions interpreting and applying the "conviction" term to prior convictions vacated, expunged, and otherwise eliminated by the States exceeds statutory authority. *See* 8 U.S.C. §§ 1101(a)(48)(A), 1103.

CONCLUSION

Amicus IDP respectfully urges this Court to grant the petition for review because the Board's underlying decisions in *Roldan* and *Pickering* that decline to recognize certain state expungement and vacatur laws are wrong and unauthorized interpretations of the INA and violate the Administrative Procedure Act.

Dated: June 30, 2022

Respectfully submitted,

/s/*Andrew Wachtenheim*
Andrew Wachtenheim
Nabilah Siddiquee
Seiko Shastri
Immigrant Defense Project
P.O. Box 1765
New York, NY 10013
Telephone: (212) 725-6421
E-mail: andrew@immdefense.org
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Second Circuit Rule 32, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,494 words.

Date: June 30, 2022 *<u>/s/ Andrew Wachtenheim</u>*

CERTIFICATE OF SERVICE

I, Andrew Wachtenheim, hereby certify that on June 30, 2022, I electronically filed the foregoing *Amicus Curiae* Brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by email, pursuant to the instructions of the Clerk's office.

I certify that all participants in the case are registered ACMS and CM/ECF users and that service will be accomplished by the ACMS or CM/ECF system upon the following individuals:

Virginia Gordon
United States Department of Justice
Civil Division, Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Tomoaki B. Takaki
Covington & Burling LLP
1999 Avenue of the Stars, Suite 3500
Los Angels, CA 90067-4643

Addison B. Thompson
Covington & Burling LLP
415 Mission Street, Suite 4500
San Francisco, CA 94105-2615

Date: June, 30 2022 /s/*Andrew Wachtenheim*