Russell Abrutyn
Abrutyn Law, PLLC
3765 12 Mile Road
Berkley, MI 48072
(248) 965-9440

Mark R. Barr
Lichter Immigration
1601 Vine Street
Denver, CO 80206
(303) 554-8400

Emma Winger
American Immigration Council
1318 Beacon Street, Suite 18
Brookline, MA 02446
(617) 505-5375

NON-DETAINED
DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of Michael Vernon THOMAS, In Removal Proceedings	File No.: A035 549 938
In the Matter of Joseph Lloyd THOMPSON, In Removal Proceedings	File No.: A041 352 799

BRIEF OF AMICI CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND AMERICAN IMMIGRATION COUNCIL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Decisions of the U.S. Supreme Court

Decisions of the U.S. Court of Appeals

Decision of the Board of Immigration Appeals

U.S. Constitution

U.S. Code

Immigration and Nationality Act

Federal Regulations

Other Authorities

I. INTRODUCTION

Amici American Immigration Lawyers Association and American Immigration Council proffer this brief in response to the Attorney General's amicus invitation to "address 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." *Matter of Thomas* and *Matter of Thompson,* 27 I&N Dec. 556 (A.G. 2019).

II. STATEMENT OF AMICI INTERESTS

The American Immigration Lawyers Association (AILA) is a national association with more than 15,000 members throughout the United States, 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; to cultivate the jurisprudence of the immigration laws; and 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 (DHS), immigration courts, and the Board of Immigration Appeals (BIA or Board), as well as before the U.S. District Courts, U.S. Courts of Appeals, and before the Attorney General.

The American Immigration Council (the Council) is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of immigrants in the United States. The organization has a substantial interest in ensuring that noncitizens receive the full benefit of state court sentencing modifications and clarifications, as required by § 101(a)(48)(B) of the Immigration and Nationality Act and principles of full faith and credit.

III. ARGUMENT

As an initial matter, amici submit that the Attorney General's invitation is overbroad and that when ruling on this matter, the Attorney General should limit himself to the issues in controversy in each case—namely, the effect of Georgia procedures to modify and clarify sentences. In ruling on these narrow issues, the Attorney

General is bound by the plain language of the statute and half a century of agency precedent applying full faith and credit to state court judgments. Finally, if the Attorney General chooses to create a new rule governing the effect of state court sentence modifications, it must be prospective only.

A. Overbreadth of Request for Amicus Briefs

Amici write to express their concerns with the sweeping scope of the Attorney General's proposed adjudicatory rulemaking. The cases taken under his review concern post-conviction procedures under which Georgia courts may clarify the sentences of citizen and non-citizen defendants or modify misdemeanor sentences more than one year after imposition of the sentence. While there are discrete issues with the Georgia schemes, and their impact on immigration proceedings, the request for amicus briefing suggests a far wider reexamination of the immigration impact of *all* post-conviction procedures. He has invited the parties and amici to opine on the impact of criminal court judgments that vacate a criminal conviction as well as those that modify or clarify a sentence.

First, the Attorney General need not, and should not, use these two cases as a means of altering the existing framework for analyzing the immigration consequences of post-conviction alterations of a non-citizen's conviction. *Matter of Pickering* is the standard for assessing the immigration impact of vacated convictions. 23 I&N Dec. 621 (BIA 2003), *rev'd on other grounds by Pickering v. Gonzales*, 465 F.3d 263, 271 (6th Cir. 2006) (affirming the *Pickering* test but finding it was not properly applied in Mr. Pickering's case); *Matter of Conde*, 27 I&N Dec. 251 (BIA 2018) (reaffirming *Pickering* as the test for determining whether to give effect to vacated criminal convictions). It is not at issue in either *Matter of Thomas* or *Matter of Thompson*, and, therefore, the Attorney General should refrain from altering the uniformly accepted rule that a conviction vacated on the basis of a procedural or substantive defect in the criminal proceedings must be recognized for immigration purposes. Second, regarding sentence modifications and their immigration impacts, the clear language of the Immigration and Nationality Act (INA) supports the interpretation in *Matter of Cota-Vargas*. 23 I&N Dec. 849 (BIA 2005). In *Matter of Cota-Vargas*, the agency recognized that the plain language of INA § 101(a)(48)(B)

dictated its conclusion that a modified or reduced sentence will be recognized for immigration purposes no matter the reason for the change. *Id.* Only Congress can change the impact of sentencing modifications and clarifications.

1. ***Any new rule announced by the Attorney General in* Matter of Thomas *and* Matter of Thompson *must necessarily be limited to the particularities of Georgia's sentencing law.***

The Attorney General may certify agency decisions to himself for review and possible rulemaking via adjudication. 8 C.F.R. § 1003.1(h). As a result, he may choose to make new rules through the certification and adjudication process rather than through the promulgation of regulations. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). But where the Attorney General chooses adjudication as a vehicle for exercising his delegated policy-making authority to write a new rule, the case at hand should involve the issue on which the Attorney General wishes to opine.

The cases at issue here both involve removal proceedings conducted under the statutory limits of INA § 240. In removal proceedings, immigration judges act as delegates of the Attorney

General, with the ability to "take any action consistent with their authorities under the Act." 8 C.F.R. § 1003.10(b). Under INA § 240(a)(1), "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of [a noncitizen]." The scope of an immigration judge's authority in § 240 proceedings is therefore limited to those factual and legal determinations relevant to determining admissibility or deportability. The Attorney General, where he is reviewing his delegate's determination within the boundaries of a § 240 proceedings, is similarly cabined to only issuing a decision that bears on the admissibility or deportability of the respondent. When certifying a removal case to himself, he simply has no statutory authority to use his adjudicatory rule-making authority to issue a new legal interpretation that is of no relevance to the admissibility or deportability of the parties to the proceeding.

This limitation on the Attorney General's adjudicatory rulemaking consistent with general principles of administrative law. Under the Administrative Procedure Act, for example, the parties to a proceeding are to be given "notice of issues controverted in fact or law," with the presumption being that adjudicatory hearings must necessarily involve

only contested issues. 5 U.S.C. § 554(b). Likewise, where an agency decision is reviewed, the scope of the reviewer's authority can be no greater than the powers of the adjudicator in the initial decision. 5 U.S.C. § 557(b).

If the Attorney General announced a new rule in an adjudication brought under a § 240 removal proceeding, and the new rule had no bearing on the admissibility or deportability of the respondent, it would frustrate judicial review. While a respondent with a final order of removal can generally seek judicial review under INA § 242(a)(1), the scope of that review would be limited by actual controversies, with a court unable to decide "abstract propositions." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920)); *see also* U.S. Const. art. III, § 2, cl. 1; *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013).

Matter of Thomas and *Matter of Thompson* both concern post-conviction alterations or clarifications of a criminal *sentence*, with the possible immigration impact assessed with reference to INA § 101(a)(48)(B). Neither concern the vacatur of a criminal *conviction*, which is assessed for immigration consequences under INA §

101(a)(48)(A). The immigration impacts of post-conviction changes to a sentence are materially different than changes to the actual conviction. As the Ninth Circuit has recognized, "a state court expungement of a conviction is qualitatively different from a state court order to classify an offense or modify a sentence." *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 846 (9th Cir. 2003); *overruled on other grounds Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014).[1]

Should the Attorney General wish to reexamine *Matter of Pickering* and the rubric used for deciding when to give immigration effect to vacated convictions, he should either proceed with notice-and-comment rulemaking or choose an adjudicatory vehicle that raises the issue. His request in *Matter of Thomas* and *Matter of Thompson* for a consideration of "whether, and under what circumstances, judicial alteration of a criminal conviction . . . should be taken into consideration in determining the immigration consequences of the conviction" is therefore misplaced. The scope of any Attorney General adjudication in *Matter of Thomas* and *Matter of Thompson* must

---

[1] *See also Cota-Vargas*, 23 I&N Dec. at 852 (seeing "no discernible basis in the language of the [INA]" to treat modifications and vacaturs alike).

necessarily be limited to the narrow issue of post-conviction sentence clarifications and modifications under Georgia law.

2. *The rule set forth in* Matter of Cota-Vargas *is supported by the plain language of the statute.*

When the statutory language is plain, there is no ambiguity for the agency to resolve. The agency must give effect to the plain statutory language. The definition of 'term of imprisonment' is clear and plain, requiring the agency to follow the clear Congressional mandate. The clarity of the definition at INA § 101(a)(48)(B) was recognized by the Board in *Cota-Vargas*, in which it held that:

> This language plainly instructs us to disregard the term of imprisonment that was actually imposed upon an alien in favor of the term of imprisonment that was ordered, but not necessarily imposed, by the trial court. [internal citations omitted]. However, *we see nothing in the language or stated purpose of section 101(a)(48)(B) that would authorize us to equate a sentence that has been modified or vacated by a court ab initio with one that has merely been suspended.*

23 I&N Dec. at 852 (emphasis added). As a result, the Board observed that the application of "the *Pickering* rationale to sentence modifications *has no discernible basis in the language of the Act.*" *Id.* (emphasis added).

The recognized lack of any ambiguity regarding the INA definition of "term of imprisonment" and post-conviction sentence modifications necessarily limits the ability of the Attorney General to now fashion a new rule. As the Supreme Court has cautioned, "[i]f the intent of Congress is clear, that is the end of the matter; [. . .] the agency [ ] must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Board recognized the need for Congressional action if its rule regarding the immigration impact of modified or reduced sentences was to be changed, writing in *Cota-Vargas* that it could not "force section 101(a)(48)(B) of the Act to serve a purpose that cannot be fairly reconciled with its language." *Cota-Vargas*, 23 I&N Dec. at 852.

B. Full Faith and Credit Accorded to State Court Judgments Modifying or Clarifying Sentences

The narrow issue presented in the two underlying cases is whether the Attorney General should recognize two Georgia state court judgments, one modifying Respondent Thompson's sentence and the other clarifying Respondent Thomas's sentence, when determining Respondents' "term of imprisonment" under INA § 101(a)(48)(B). In making this determination, the Attorney General is not writing on a

blank slate. For over half a century, the Board has accepted "at face value . . . a judgment regularly granted by a competent court, unless a fatal defect is evident upon the judgment's face." *Matter of F-*, 8 I&N Dec. 251, 253 (BIA 1959). It repeatedly has applied this principle, with constitutional origins and codified at 28 U.S.C. § 1738, to state court sentencing decisions and alterations. *See, e.g., Cota-Vargas*, 23 I&N Dec. at 852; *Matter of Song*, 23 I&N Dec. 173, 174 (BIA 2001). The Board's long history of refusing to "go behind" state court sentencing judgments is necessary to ensure that immigration authorities do not deviate from their role in enforcing federal immigration law, engaging instead in collateral inquiries into state court law and procedures on which they have no expertise. To do otherwise would open the door to allowing Respondents to collaterally challenge their convictions in removal proceedings.

1. ***Agency precedent forbids collateral attacks on state court judgments, including state court sentencing judgments.***

Since at least the post-World War II era, the Board has recognized that state court judgments generally are not subject to collateral attack, even when the state court has erred. "Where a State court has jurisdiction of the subject matter and the person, the fact that an

erroneous judgment is entered does not render the judgment void or subject to collateral attack in a Federal court." *Matter of J- & Y-*, 3 I&N Dec. 657, 659-60 (BIA 1949). In so holding, the Board has complied with Congress' command that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738.

Even when the Board has compelling evidence that the state court lacked jurisdiction, the Board will generally accept a state court's assertion of jurisdiction. *See Matter of F-*, 8 I&N Dec. at 253-54; *Matter of Kwan*, 11 I&N Dec. 205, 208-09 (BIA 1965). The burden to undermine a state court order "is a heavy one." *Matter of F-*, 8 I&N Dec. at 253. In *Matter of F-*, the beneficiary of a visa petition admitted to immigration authorities that he did not reside in Florida at the time of his divorce, a jurisdictional prerequisite to obtaining a divorce decree under Florida law. *Id.* at 252-53. The Board nevertheless gave full faith and credit to the decree, explaining that immigration officers "are not equipped to

adjudicate troublesome legal questions" regarding state divorce law and so the judgment "should be accepted at face value." *Id.* at 253-54.

In a similar case, the Board accepted a state court order recognizing the petitioner and beneficiary's marriage and purporting to invalidate the beneficiary's prior marriage, even though the prior spouse was not a party to the action. *Matter of Kwan*, 11 I&N Dec. at 208-09. In rejecting a challenge to the marriage by the former Immigration and Naturalization Service (INS), the Board explained:

> Exploration of the ramifications of the legal questions presented would inevitably lead into labyrinths of jurisdiction, domicile, residence and status with no satisfactory goal and an involvement in complexities utterly foreign to the responsibilities of administrating the immigration laws. It would not appear to be sound administrative practice to expect immigration officers to pause in executing their exacting duties to embark upon the collateral inquiry as to whether state decrees were supported by proper jurisdiction and such inquiry would impede the expeditious administration of the immigration laws.

Id. at 208. "The wisest course," the BIA explained, was to "accept at face value" the state court judgment. *Id.*; *see also Matter of San Juan*, 17 I&N Dec. 66, 68-69 (BIA 1979) (according divorce decree full faith and credit despite petitioner's admission that she did not meet any of the jurisdictional requirements for the divorce).

Similarly, the Board has long applied the full faith and credit doctrine to state court judgments in criminal proceedings. *See, e.g. Matter of H-*, 9 I&N Dec. 380, 382 (BIA 1961) (affording full faith and credit to state court vacatur of a criminal conviction); *Matter of O'Sullivan*, 10 I&N Dec. 320, 338-40 (BIA 1963) (recognizing state court vacatur of a narcotics conviction, even if done for the purpose of avoiding deportation and despite questions regarding the authority of the state court to enter the vacatur), *partially superseded by statute as stated in Ali v. U.S. Atty. Gen.*, 443 F.3d 804, 812 n.8 (11th Cir. 2006); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379-80 (BIA 2000) (refusing to "go behind" a state court vacatur to determine whether the state court complied with state law). In the narrow circumstances where the BIA has declined to apply full faith and credit to certain state court criminal judgments, it has done so only when compelled by the express intent of Congress. *See, e.g., Matter of A-F-*, 8 I&N Dec. 429, 445-46 (A.G. 1959) (holding that amendments to the grounds of deportation for narcotics violations in former INA § 241(a)(11), including elimination of the availability of a pardon to avoid deportation, prevented the agency from giving effect to an automatic

expungement of a narcotics conviction following successful completion of probation); *Matter of Roldan*, 22 I&N Dec. 512, 524–28 (BIA 1999) (finding that, under the new definition of conviction at INA § 101(a)(48)(A), the agency could not give effect to convictions vacated by operation of a state rehabilitative statute); *Pickering*, 23 I&N Dec. at 623–25 (finding the new definition at INA § 101(a)(48)(A) to prohibit recognition of vacaturs not vacated based on a defect in the underlying proceedings); *see also Matter of Adamiak*, 23 I&N Dec. 878, 879-80 (BIA 2006) ("In the absence of a statutory directive to the contrary, we are required by 28 U.S.C. § 1738 (2000) to give full faith and credit to this State court judgment [vacating the conviction]").

Even where Board precedent has narrowed the classes of criminal judgments it will recognize, it still will not look beyond the face of a state court judgment when determining whether to give the order effect. In *Matter of Rodriguez-Ruiz,* the respondent obtained a state court order vacating a conviction "on the legal merits." 22 I&N Dec. at 1379. The INS argued that the state court issued the order solely to avoid immigration consequences and therefore did not meet the requirements of *Matter of Roldan. Id.* The Board refused "to go behind the state court

judgment and question whether the New York court acted in accordance with its own state law." *Id.* at 1379-80. Instead, the Board gave full faith and credit to the state court order, citing 28 U.S.C. § 1738. *Id.* at 1380; *see also Pinho v. Gonzales*, 432 F.3d 193, 212 (3rd Cir. 2005) (refusing to "endorse a test which requires speculation about, or scrutiny of, the reasons for judges' actions other than those reasons that appear on the record" when determining the immigration effect of a state court vacatur).

On the key issue before the Attorney General—state court modifications and clarifications of sentences—the Board has consistently applied full faith and credit principles to such orders. *See Cota-Vargas*, 23 I&N Dec. at 852 (giving full faith and credit to state court sentencing modification regardless of the reason for the modification); *Matter of Song*, 23 I&N Dec. at 174 (same); *Matter of Estrada*, 26 I&N Dec. 749, 754-56 (BIA 2016) (recognizing Georgia state court clarification that sentence did not include any period of confinement, despite Immigration Judge's determination that initial sentence included 12 months of confinement); *see also Matter of Velasquez-Rios*, 27 I&N Dec. 470, 474 n.9 (BIA 2018) (when

determining "the *actual* sentence" the Board looks to "a State court judge's specific sentence or into subsequent modifications to that sentence"); *Matter of Ramirez*, 25 I&N Dec. 203, 205-06 (BIA 2010) (holding state court modification of sentence following violation of probation is the controlling sentence under INA § 101(a)(48)(B)).

The Board has correctly refused to narrow the class of sentencing orders to which it will accord full faith and credit. In *Matter of Cota-Vargas*, the Board considered whether to recognize a state court order reducing a sentence expressly to avoid immigration consequences. 23 I&N Dec. 850. The Board concluded that there is "nothing in the language or stated purpose of [INA §] 101(a)(48)(B)" to justify refusing to recognize a modified sentence, even one issued solely to avoid deportation. *Id.* at 852 (citing *Matter of Song*, 23 I&N Dec. at 173-74). The BIA distinguished *Matter of Pickering*, which relied on the distinct language and purpose behind INA § 101(a)(48)(A). *Id.* at 851-52. In so holding, the Board reaffirmed its long-held position that it would only abandon the doctrine of full faith and credit if Congress clearly so required. *Id.* at 852; *see also Matter of Adamiak*, 23 I&N Dec. at 879-80; *Matter of O'Sullivan*, 10 I&N Dec. at 338-39 (according full faith and

credit to state court vacatur of a narcotics conviction where Congress had not specifically limited the effect of such vacaturs, even though Congress had limited the effect of pardons and judicial recommendations against deportation for narcotics convictions).

In sum, continuing to give full faith and credit to Respondent Thompson's and Respondent Thomas's sentence modifications is consistent with more than fifty years of the agency's own jurisprudence. The Attorney General should not "go behind" the judgments at issue here to conclude that either order was contrary to Georgia law. Instead, he should accord full faith and credit to the state court orders at issue in both cases.

2. Application of full faith and credit to sentencing orders is particularly appropriate where the agency has no expertise on state sentencing laws.

The Board repeatedly has affirmed that it applies full faith and credit to state court judgments not only to comply with constitutional and statutory requirements, but also because inquiry into state court matters in which the agency has no expertise "would impede the expeditious administration of the immigration laws." *Kwan*, 11 I&N Dec. at 208; *see also F-*, 8 I&N Dec. at 253-54 (rejecting a collateral

attack on a divorce decree because "the Service can hardly undertake to become a disputant in the divorce arena since immigration officers are not equipped to adjudicate troublesome legal questions of this character"). It is beyond dispute that Board Members and Immigration Judges do not have expertise in state criminal law, including the vagaries of state sentencing law. *See, e.g.*, *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 779 (9th Cir. 2018) (observing that "the BIA has no statutory expertise in . . . state law matters") (quotation omitted); *Omargharib v. Holder*, 775 F.3d 192, 196 (4th Cir. 2014) (holding that the Board has "no particular expertise" over state law) (quotation omitted); *Patel v. Holder*, 707 F.3d 77, 79 (1st Cir. 2013) (same); *Jean-Louis v. Attorney Gen. of U.S.*, 582 F.3d 462, 466 (3rd Cir. 2009) (same); *Al-Najar v. Mukasey*, 515 F.3d 708, 714 (6th Cir. 2008) (same); *Mugalli v. Ashcroft*, 258 F.3d 52, 56 (2nd Cir. 2001) (same).

For this reason, the agency is poorly suited to "go behind" state court sentencing decisions to determine whether they meet the requirements of state law. State and local sentencing law—governed variously by state statutes, state common law, state sentencing guidelines, state constitutions, state regulations, local court rules,

municipal ordinances, and a vast array of varying court practices—is not a realm a federal immigration agency should enter unnecessarily. *See, e.g.*, *United States v. Rockymore*, 909 F.3d 167, 169 (6th Cir. 2018) ("Tennessee's criminal sentencing scheme is sufficiently complicated that even Tennessee courts have experienced difficulty" applying it); *Ceron*, 747 F.3d at 778 (overruling precedent that "misunderstood" California sentencing law); Robina Institute of Criminal Law and Criminal Justice, *Sentencing Commissions and Guidelines By the Numbers*, 2 (2017) ("[State] jurisdictions have moved back and forth between [sentencing guidelines and sentencing commissions] as sentencing commissions have been formed and sunsetted and as guidelines systems have developed and been undercut by various factors[.]"); *id.* at 7 (excluding Ohio from a guidelines table "because of the uniqueness and complexity of its system"). Instead, the Attorney General should reaffirm that the agency must not become involved state court sentencing "complexities utterly foreign to the responsibility of administrating the immigration laws" and instead, as discussed above, he should accord full faith and credit to such orders. *Kwan*, 11 I&N Dec. at 208.

C. Prospective-Only Application of Any New Rule Regarding Sentence Modifications and Clarifications

For more than 15 years, noncitizens, prosecutors, and state judges have relied on the Board's decisions in *Matter of Cota-Vargas* and *Matter of Song* in pursuing modifications and clarifications of sentences. They did so because the Board's decision was based on the plain language of INA § 101(a)(48)(B). *Matter of Cota-Vargas*, 23 I&N Dec. at 852. Moreover, the Board's decision was consistent with the obligation to afford full faith a credit to a facially valid state court judgment, an obligation that is as old as the Republic. *See Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 462-63 (1982).

Consistent with long-standing and well-established Board case law, and except to the extent required by state law, noncitizens often did not provide a reason when asking courts to modify their sentences and the courts did not provide one. Amici believe, as the federal courts and Board believe, that *Matter of Cota-Vargas* was correctly decided based on the plain language of § 101(a)(48)(B). *See* Part III.A.2. However, in this section, because amici are concerned that the Administration's public pronouncements on immigration indicate that

this matter has already been decided, we explain why a new rule cannot be applied retroactively.

If the Attorney General creates new rules for sentence modifications, the Attorney General should apply them only prospectively to modifications occurring after the date of the Attorney General's decision. The retroactive application of the new rule "must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Chenery*, 332 U.S. at 203. New rules, especially ones as drastic as those being contemplated, are presumed to apply prospectively. *Lucio-Rayos v. Sessions*, 875 F.3d 573, 578 (10th Cir. 2017).

When the Board announces a rule based on the plain language of a statute, it is expected that noncitizen defendants, criminal defense attorneys, prosecutors, and judges will rely on that pronouncement in sentencing proceedings. *See Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) ("Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants."); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (observing that certainty regarding the immigration consequences of criminal dispositions relied on in

negotiating plea deals). "To suggest that when you find a controlling judicial decision on point you can't rely on it because an agency (mind you, not Congress) could someday act to revise it would be to create a trap for the unwary and paradoxically encourage those who bother to consult the law to disregard what they find." *Robles v. Lynch*, 803 F.3d 1165, 1178-79 (10th Cir. 2015) (Gorsuch, J.). Those who modified their sentences in conformity with *Matter of Cota-Vargas* should receive the benefit of their reliance on the Board's rule, founded in the plain language of the statute and affirmed by federal courts.

Retroactive application of a new rule announced here would violate the Sixth Amendment rights of noncitizen defendants to receive accurate advice about the immigration consequences of a sentence modification and interfere with the ability of noncitizen defendants, their attorneys, prosecutors, and state judges to accurately factor in immigration consequences in determining whether and how to modify a sentence to ensure that the punishment fits the crime. *See Padilla*, 559 U.S. at 373.

The courts have applied a multi-part test when considering whether to apply an agency rule retroactively:

> (1) whether the case is one of first impression;
> (2) whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law;
> (3) the extent to which the party against whom the new rule is applied relied on the former rule;
> (4) the degree of the burden which a retroactive order places on a party; and
> (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale & Dep't Store Union v. Nat'l Labor Relations Bd., 466 F.2d 380, 390 (D.C. Cir. 1972); *Obeya v. Sessions*, 884 F.3d 442, 445 (2d Cir. 2018); *see also Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1295 (9th Cir. 2018).

All five factors weigh against the retroactive application of a new rule.

Looking at the first factor, this is not a matter of first impression. The Board's rule has been in place since at least 2001, was affirmed in *Matter of Cota-Vargas*, and has been accepted by the federal courts. *See Matter of Cota-Vargas*, 23 I&N Dec. at 850-51 *affirming Matter of Song*, 23 I&N Dec. 173. The Board's plain language reading is nearly as old as the 1997 statute itself, and the agency has had no other interpretation of INA § 101(a)(48)(B).

Likewise, the second factor works against a retroactive application. The *Cota-Vargas* rule is well-established and has provided a workable, easy-to-apply framework for noncitizens, prosecutors, state court judges, Immigration Judges, and the Department of Homeland Security. There is no void here for the Attorney General to fill. A new interpretation of the sentence modification standard and INA § 101(a)(48)(B) would be abrupt, to say the least. The law is settled and working just fine.

Third, noncitizens have justifiably relied on *Cota-Vargas* because the Board found the statute unambiguous. As the Second Circuit observed, "[t]here can be little doubt" that noncitizens are "acutely aware of the immigration consequences of their convictions," given that "deportation is an integral part—indeed, sometimes the most important part—of the penalty." *Obeya*, 884 F.3d at 448 (quoting *Immigration & Naturalize Serv. v. St. Cyr*, 533 U.S. 289, 322 (2001) and *Padilla*, 559 U.S. at 364); *cf Vartelas v. Holder*, 566 U.S. 257, 273-74 (2012) (holding that reliance is not necessary, but "strengthens the case for reading a" new rule prospectively).

Here, reliance was reasonable and expected. The Board has consistently affirmed and upheld *Matter of Cota-Vargas* and *Matter of Song*, and the federal courts have not disagreed, so there was no hint that the agency would suddenly find the statutory language ambiguous or that the plain language could mean anything else. When seeking the vacatur of convictions themselves, noncitizens have shown that they understand the special requirements of *Pickering* and INA § 101(a)(48)(A) and therefore explicitly state the underlying defect in the criminal proceeding that they are seeking to remedy. The Board found that the plain language of INA § 101(a)(48)(B) does not require this, so noncitizens have not explicitly stated the reasons for seeking sentence modifications, even though they could presumably have done that if necessary. Furthermore, the Board's decision was consistent with the directive to give full faith and credit to state court decisions in the absence of explicit contrary congressional intent. *See Kremer*, 456 U.S. at 462-63. Reliance here is obvious and reasonable.

Fourth, the retroactive application of a new rule on sentence modifications would impose a significant burden on noncitizens. They would suddenly be subject to removal based on a sentence that a state

court has already vacated or modified. They would need to seek a new modification, which may not be possible because of the passage of time or the destruction of state court records. Removal is a severe consequence and would be inevitable should the Attorney General disregard the Board's and federal court's long-standing interpretation. The government has acknowledged that in immigration cases, the fourth factor favors prospective application because removal is such a "massive" consequence. *Lugo v. Holder*, 783 F.3d 119, 121 (2d Cir. 2015); *Obeya*, 884 F.3d at 445 (same).

State courts would also be burdened because they would receive an influx of sentence modification requests for matters that they already addressed and presumed closed.

Finally, there is no statutory interest in applying a new rule retroactively. Any administrative interest is offset by the drastic consequences for families and communities, the burden it places on state criminal justice systems, and the degree to which it would undermine public reliance on the agency's plain language interpretation of a statute.

Therefore, should the Attorney General reject longstanding agency rules, the new decision must not be applied retroactively to sentence modifications occurring before the date of the Attorney General's decision. Prospective application is imperative where the prior rule was clear and the new rule is a significant departure. *See Obeya*, 884 F.3d 442 (change in Board's interpretation of crimes involving moral turpitude as it related to theft offenses applies prospectively only and no showing of reliance is required); *see also Garcia-Martinez*, 886 F.3d 1291 (same); *Monteon-Camargo v. Barr*, 918 F.3d 423, 430-31 (5th Cir. 2019) (same).

IV. CONCLUSION

For the foregoing reasons, the Attorney General should limit his review to the narrow issues before him and accord full faith and credit to the Georgia sentence modification and clarification reviewed by the agency below. If the Attorney General does announce a new rule regarding the immigration consequences of sentence modifications or clarifications, the new interpretation should apply only prospectively.

Respectfully Submitted,

Dated: August 2, 2019

Russell Abrutyn
Abrutyn Law, PLLC
3765 12 Mile Road
Berkley, MI 48072
(248) 965-9440

Mark R. Barr
Lichter Immigration
1601 Vine Street
Denver, CO 80206
(303) 554-8400

Emma Winger
American Immigration Council
1318 Beacon Street, Suite 18
Brookline, MA 02446
(617) 505-5375

CERTIFICATE OF SERVICE

On August 2, 2019, I mailed three copies of the Brief of Amici Curiae via first class mail to:

United States Department of Justice
Office of Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 205030

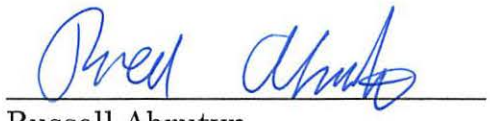
And by email to AGCertficiation@usdoj.gov.

I served the parties by first class mail as follows:

Jonathan Polonsky
Kilpatrick Townsend & Stockton LLP
The Grace Building
1114 Avenue of the Americas
NY, NY 10036-7703

Charles Roth
National Immigrant Justice Center
224 South Michigan Avenue
Suite 600
Chicago, IL 60604

Sarah L. Martin
Associate Legal Advisor
Immigration Law and Practice Division
U.S. Immigration and Customs Enforcement
500 12th Street, SW
Mail Stop 5900
Washington, DC 20536



Russell Abrutyn
Abrutyn Law PLLC
3765 12 Mile Road
Berkley, MI 48072
(248) 965-9440
russell@abrutyn.com