No. 19-1427

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WAHSEEM AHSAN KHAN,
Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICI CURIAE THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYER'S GUILD, AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER

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RULE 29(a)(2) STATEMENT

Pursuant to FRAP 29(a)(2), undersigned counsel for amici curiae states that all parties have consented to the filing of this brief.

Date: April 26, 2019

/s/ David A. Isaacson
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RULE 29(a)(4)(A) CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for amici curiae certifies pursuant to FRAP 29(a)(4)(A) that the American Immigration Lawyers' Association, the National Immigration Project of the National Lawyers Guild, and Immigrant Defense Project are non-profit organizations that do not have any parent corporations or issue stock, so there is no publicly held corporation which owns 10% or more of the stock of any of them.

Date: April 26, 2019

/s/ David A. Isaacson
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RULE 29(a)(4)(E) STATEMENT

Pursuant to FRAP 29(a)(4)(E), undersigned counsel for amici curiae affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief.

Date: April 26, 2019

/s/ David A. Isaacson
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STATEMENT OF INTEREST OF AMICUS CURIAE

Amici curiae, American Immigration Lawyers Association (AILA), the National Immigration Project of the National Lawyers Guild, and Immigrant Defense Project, file the following brief in support of Petitioner, with the consent of all parties.

AILA is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; 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. Members of AILA practice regularly before the Department of Homeland Security (DHS) and the Executive Office of Immigration Review (including the Board of Immigration Appeals (BIA) and immigration courts), as well as before United States District Courts, United States Courts of Appeals, and the United States Supreme Court. AILA is a professional trade association dedicated to the promotion of justice for immigrants. Through their experience representing immigrants, AILA attorneys have gained extensive knowledge of the interaction between state criminal laws and immigration law.

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. For thirty years, the NIPNLG has provided legal training to the bar and the bench on immigration consequences of criminal conduct and defenses to removal. It is also the author of *Immigration Law and Crimes* (2014 ed.) and three other treatises published by Thomson-West, and has participated as amici curiae in cases before the Third Circuit and the Supreme Court.

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

See, e.g., *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief).

Amici are concerned that as many states repeal laws prohibiting conduct such as possession of marijuana that would otherwise have given rise to removability under federal law, the proper operation of the immigration system will be impaired by a failure to recognize the relevance of a state's judgment about what conduct ought to be criminal.

SUMMARY OF ARGUMENT

The BIA's decision rests on a failure to appreciate the significance of action by a state legislature to decriminalize certain conduct and provide for the destruction of the records of previous convictions for that conduct. This is, in effect, a determination by the state legislature that the conduct is not criminal and never should have been criminal. Just like a determination by a state court that certain conduct is not and never should have been criminal, such a determination by a state legislature renders a conviction substantively defective for purposes of *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd by Pickering v. Gonzales*, 46 F.3d 263 (6th Cir. 2006), and *Pinho v. Gonzales*, 432 F.3d 193 (3d Cir. 2005).

Thus, such a vacated conviction should not continue to have immigration consequences.

Various different types of conduct, ranging from marijuana possession to certain types of sexual activity, have been decriminalized or legalized in different states by a mix of judicial and legislative measures. To accept state judicial actions along these lines as recognizing a substantive defect in prior convictions, but refuse to accept legislative actions as doing so, produces absurd results and does not respect the sovereign dignity of the states. Legislative decriminalization, accompanied by provision for expungement or destruction of records of pre-existing convictions for the acts made non-criminal, should be recognized for immigration purposes as eliminating the effect of such previous convictions. For this reason, the petition for review should be granted.

ARGUMENT

I. Introduction

Petitioner's brief has explained why legislative decriminalization and the related destruction of records of a conviction under Connecticut law is not properly viewed as a "rehabilitative" mechanism. Petitioner's Brief at 10-13. We write in the hope of providing additional insight regarding how legislative decriminalization should best be viewed and why destruction of records of a

conviction, pursuant to state law, following legislative decriminalization should not leave the conviction valid for immigration purposes.

As the BIA acknowledged in its decision, Connecticut in 2011 decriminalized the marijuana-possession offense of which Petitioner had been convicted in 2006. Under state law, Petitioner was then granted Destruction of Record of Decriminalized Offense. The petition for such destruction cited various provisions of the Connecticut and United States Constitutions, and it may well be that in this particular case it was inappropriate for the Board to take the view that the petition was granted solely on the basis of the decriminalization and not those other provisions.[1] For purposes of this amicus brief, however, we assume for the sake of argument that the records of the conviction were subject to destruction simply because Connecticut had decriminalized the offense and had enacted into law a statutory procedure for obtaining destruction of the records of a conviction for decriminalized conduct. We offer this brief to explain why, under those circumstances, the conviction should not remain effective for immigration purposes under the test set out in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd by Pickering v. Gonzales*, 46 F.3d 263 (6th Cir. 2006), and *Pinho v. Gonzales*, 432 F.3d 193 (3d Cir. 2005).

[1] Factual disputes such as these are beyond the scope of this amicus brief.

II. A Legislative Decision to Decriminalize Conduct and Provide For Destruction of Records Equates to a Finding that the Conduct Should Not Have Been Criminal

By decriminalizing particular conduct, the Connecticut legislature has made a determination that this conduct should no longer be a crime. And by providing for destruction of the records of decriminalized offenses, CGS § 54-142d,[2] the Connecticut legislature determined that decriminalized conduct should never have been a crime, and thus it is inappropriate for those convicted of it to continue to suffer the consequences of a criminal conviction. As the chairman of the Judiciary Committee of the Connecticut House, Rep. Richard Tulisano, put it at the time when he moved for adoption of the bill, the law "erases criminal records for those individuals, allows them to have the records erased, if they were convicted of a crime which this General Assembly subsequently decided it had not been a crime." Remarks of Rep. Tulisano, Legislative History for Connecticut Act HB-5314, PA 6, 1983, http://ctstatelibrary.org/wp-content/lh-bills/1983_PA6_HB5314.pdf at 4

[2] "Whenever any person has been convicted of an offense in any court in this state and such offense has been decriminalized subsequent to the date of such conviction, such person may file a petition with the superior court at the location in which such conviction was effected, or with the superior court at the location having custody of the records of such conviction or with the records center of the Judicial Department if such conviction was in the Court of Common Pleas, Circuit Court, municipal court or by a trial justice, for an order of erasure, and the Superior Court or records center of the Judicial Department shall direct all police and court records and records of the state's or prosecuting attorney pertaining to such case to be physically destroyed." C.G.S. § 54-142d.

(last accessed April 24, 2019). This is not limited to the context of possession of marijuana, but extends to other legislative decriminalizations such as, for example, sexual activity between teenagers close together in age, *see State v. Boswell*, 142 Conn. App. 21, 62 A.3d 1158 (Conn. App. Ct. 2013) (petition for destruction of record granted following decriminalization of consensual sex between a person between the ages of thirteen and sixteen and a person who is between two and three years older).

It is for this reason that under Connecticut law, petitions for the destruction of a record of a decriminalized offense are not subject to the same restrictions as other erasure provisions which allow for the destruction of records of arrests when charged are dismissed. Ordinary erasure under CGS § 54-142a does not apply to "any information or indictment containing more than one count ... when the criminal case is disposed of *unless and until all counts are entitled to erasure* in accordance with the provisions of this section," whereas destruction of record of a decriminalized offense under CGS § 54-142d is not subject to this restriction. *State v. Spielberg*, 323 Conn. 756, 763-764, 150 A.3d 1118, 1121-1122 (2016). Someone who has been arrested, then acquitted of a single offense but convicted of others arising out of the same incident, is not entitled to the same degree of solicitude under Connecticut law as someone arrested and convicted for an offense

that the Connecticut legislature has determined should not be a crime and "had not been a crime." Remarks of Rep. Tulisano, *supra*.

As the Supreme Court of Connecticut explained in interpreting the destruction-of-records statute, it could not "perceive any reason why the legislature would have intended that criminal records be retained for conduct that is no longer criminal and that would not lead to the creation of criminal records if committed today." *State v. Menditto*, 315 Conn. 861, 874, 110 A.3d 410, 418 (2015). Even where conduct has not been rendered completely legal, it should not give rise to a criminal record where it has been reclassified as a minor civil violation analogous to "maintaining state records using unapproved paper, ink, or loose-leaf binders," *id.*, or

> failure of a selectman to draw a treasury order in duplicate; General Statutes § 7–13 . . . failure to register a bee hive with the state entomologist; General Statutes § 22–89; failure to provide adequate toilet accommodations for both sexes on a tobacco plantation; General Statutes § 31–38; failure of one performing a marriage to timely return a marriage license certificate; General Statutes § 46b–34; and knowingly vending grass seed containing seed of the Canada thistle. General Statutes § 53–321.

Menditto, 315 Conn. 861 at 874 n.8, 110 A.3d at 418 n.8. Indeed, under the Connecticut law in effect at the time of *Menditto*, the decriminalized possession of marijuana was subject to a civil standard of proof of a preponderance of the evidence, *Menditto*, 315 Conn. 861 at 875, 110 A.3d at 418-419, so that a finding under that law clearly would not qualify as a conviction for immigration purposes

under the BIA's decision in *Matter of Eslamizar*, 23 I&N Dec. 684, 687-688 (BIA 2004) (holding that a finding of a "violation" which need only be made by a preponderance of the evidence is not a "conviction" for immigration purposes).

The authoritative interpreter of Connecticut law, *see Pinho*, 432 F.3d at 212, has told us, in *Menditto*, that destruction of records of a decriminalized offense is authorized because the legislature found it inappropriate for criminal records to be retained where the same conduct would not today lead to the creation of such records. When the legislature has determined that conduct should not be criminal, it has, in effect, extended this determination back into the past under CGS § 54-142d. The legislature has made clear that the conduct "had not been a crime." Remarks of Rep. Tulisano, *supra*.

The Immigration Judge in this case asserted that "[t]he decriminalization of possession of marijuana is not an indication that past convictions for possession of marijuana were procedurally or substantively defective." IJ Decision at 5. The Immigration Judge further asserted that "[d]estruction of the record of the offense is the means by which the state legislature ensures that convicted persons do not suffer consequences typical of criminal conviction. It is not an acknowledgement that the conviction was erroneous at the time it was decided based on some procedural or substantive grounds." *Id.* (The latter half of this conclusion is echoed in the unpublished, non-precedential Second Circuit decision cited by the

BIA, *Taylor v. Sessions*, 714 Fed.Appx. 85, 86-87 (2d Cir. 2018).) We respectfully submit that this analysis misreads the effect of combining decriminalization with a statutory provision for destruction of the records of the decriminalized offense.

Destroying criminal records, because they would not be created now as a result of the same conduct which gave rise to them originally, *Menditto*, 315 Conn. at 874, 110 A.3d at 418, is in fact an acknowledgement that the conviction was erroneous on substantive grounds at the time it was decided. At the time of Petitioner's conviction, the government of Connecticut had believed Petitioner's conduct was worthy of criminal sanction. Its statutes reflect that it subsequently determined this belief had been incorrect, and that it extended the benefit of this determination to those who had engaged in the conduct in the past as well as those who would engage in it in the future, because it determined that the conduct "had not been a crime." Remarks of Rep. Tulisano, *supra*.

Indeed, as Petitioner pointed out to the BIA, there is a constitutional equal protection component to Connecticut's having chosen to deal with past convictions for decriminalized offenses in this way. Petitioner's Brief to the BIA at 11. Had Connecticut not provided the relief of destruction of record of decriminalized offenses, it would have been in the awkward position of maintaining that past offenders should continue to stand convicted only because it had not realized at the time of their offenses that their conduct should not be criminal. *Cf. State v.*

Santiago, 318 Conn. 1, 122 A.3d 1 (2015) (holding continued application of the death penalty to be unconstitutional following prospective-only repeal by the legislature that purported to leave existing death sentences in place). The relief provided by CGS § 54-142d avoids this problem.

We note that under the law of this Circuit, it is immaterial that the Connecticut statute speaks of destruction of the record of conviction rather than using a different word such as "vacatur" or the like. As this Court noted in *Pinho*, "[t]he salient procedural situation is one in which a conviction is voided or invalidated, 'dismiss[ed], cancel[ed] ... discharge[d] or otherwise remove [d],' *Sandoval v. I.N.S.*, 240 F.3d 577, 583 (7th Cir.2001), whatever the label, and whatever the subsequent availability of the record of the conviction." *Pinho*, 432 F.3d at 206 n.15. If anything, destruction of all records of an offense, as occurs under CGS § 54-142d, provides greater relief than is necessarily given when a conviction is set aside by a court on constitutional grounds. *See, e.g., Rogers v. Slaughter*, 469 F.2d 1084 (5th Cir. 1972) (declining to order such destruction of records), *but see, e.g., Kowall v. U.S.*, 53 F.R.D. 211 (W.D. Mich. 1971) (declining to reconsider order requiring such destruction).

III. A Legislative Decision to Render Conduct Non-Criminal Should Be Respected Just As a Judicial Decision to Do So Would Be

The more familiar context in which a determination is made that a conviction is substantively (as opposed to procedurally) defective is when this

determination is made by a court, in the context of a ruling that conduct cannot constitutionally be criminalized or is not actually prohibited by a particular statute. As consideration of several different legal contexts shows, however, maintaining a distinction for *Pickering*/*Pinho* purposes between this sort of judicial determination, and decriminalization effectuated by a legislature, is illogical and would produce absurd results.

A. Possession of Marijuana

Turning first to the type of offense that is the basis for this case, simple possession of small amounts of marijuana has been decriminalized in different states by legislative action or by judicial action, as explained below. We respectfully submit that the result for *Pickering*/*Pinho* purposes should not depend on the branch of a state government that has effectuated substantively the same result.

In Alaska, the decriminalization of possession of small amounts of marijuana for personal use within the home occurred through court action, when a ban on such possession was struck down as violating the state constitution's right to privacy. *See Ravin v. State*, 537 P.2d 494 (Alaska 1975).[3] If a pre-1975 Alaska conviction for possession of a small amount of marijuana for personal use were

[3] The holding of *Ravin* was later limited so as not to cover possession of larger amounts suggestive of intent to sell, *Walker v. State*, 991 P.2d 799 (Alaska 1999), but that does not affect the basic analysis here.

subsequently vacated by an Alaska court pursuant to *Ravin*, the BIA would presumably agree that under *Matter of Pickering*, the putative conviction no longer qualified as such for immigration purposes, and this Court would so rule under *Pinho*. The decision to vacate a past Alaska marijuana conviction based on the rulings of the Alaska courts that followed *Ravin* would be recognized as a "substantive vacatur[]." *Pinho*, 432 F.3d at 207.

The difference in this case is that it is the Connecticut legislature which has made the determination that certain conduct should not be and should not have been criminal, rather than the Connecticut courts. But as the Supreme Court has explained in a different context, while a state "is certainly free to make [adjudicative] decisions on a case-by-case basis, a state is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases." *Pacific Gas & Elec. Co. v. State Energy Resources & Development Comm.*, 461 U.S. 190, 215 (1983). It is not appropriate for the BIA to withhold recognition of the state of Connecticut's determination that certain marijuana possession ought not be criminal, both going forward and retroactively, simply because that determination was made by the legislature on a categorical basis and not by state courts adjudicating individual cases.

B. Same-Sex Marriage

The illogic of the BIA's position can be seen by examining an area of law in which different states recently proceeded by judicial and legislative routes to essentially the same end during roughly the same time period. That was the legal area of same-sex marriage, until it was held protected by the Federal Constitution on a nationwide basis in *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct 2584 (2015).

Some states, such as Massachusetts, found prohibitions on same-sex marriage to be forbidden by their state constitutions. *See Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003). Other states, such as New York and New Hampshire, repealed prohibitions on same-sex marriage legislatively. *See Marriage Equality Act*, N.Y. Bill No. 08354, signed June 24, 2011, *available at* https://nyassembly.gov/leg/?default_fld=%250D%250A&bn=A08354&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y (last accessed April 24, 2019); *Bill relative to marriage and civil unions*, N.H. Bill No. HB436, signed June 3, 2009, *available at* http://www.gencourt.state.nh.us/legislation/2009/HB0436.html (last accessed April 24, 2019).

Assume that prior to the above-noted state actions, a noncitizen had previously been convicted of violating marriage regulations by performing a same-

sex marriage, but that the matter came before the BIA after the state had acted to legalize same-sex marriage through its state courts or state legislature as discussed above. Prior to *Obergefell*, for example in 2012, would the BIA have taken the position that such a conviction would retain validity for immigration purposes if it had occurred in New Hampshire, where same-sex marriage was legalized by the legislature effective in 2010, but not if it had occurred across the state line in Massachusetts, where legalization of same sex marriage was found constitutionally required by the State's highest court in 2003? That appears to be the implication of the BIA's position in this case, but it is an absurd one.

C. Same-Sex Sexual Activity

Slightly further back in U.S. legal history, the sexual acts between persons of the same sex historically referred to as "sodomy" (as well as, in many instances, related sexual acts performed between persons of the opposite sex) were criminal in a number of states until the Supreme Court held in *Lawrence v. Texas*, 539 U.S. 558 (2003), that this was impermissible under the U.S. Constitution. Convictions under such statutes were recognized as a potential basis for deportation. *See Matter of Leyva*, 16 I&N Dec. 118, 120 (BIA 1977) (holding "[t]he crime of oral sex perversion" to be a crime involving moral turpitude); *Velez-Lozano v. INS*, 463 F.2d 1305, 1307 (D.C. Cir. 1972) (holding consensual sodomy to be a crime

involving moral turpitude, and upholding an order of deportation based on a conviction for it).

Prior to the nationwide uniformity created by the Supreme Court's decision, there was a patchwork of state decisions to remove criminal prohibitions against consensual sodomy, in some cases by legislative action and in some cases by state judicial action. In Kentucky, for example, the law against same-sex sodomy was struck down as unconstitutional under the state constitution in 1992 by the state Supreme Court's decision in *Commonwealth v. Wasson*, 842 S.W. 2d 487 (Ky. 1992). The following year, in 1993, the Nevada legislature repealed Nevada's law against same-sex sexual activities, leaving only a restriction on public conduct. *See* AN ACT relating to crimes; prohibiting certain sexual conduct in public; and providing other matters properly relating thereto, Laws of Nevada 1993, ch. 236, approved June 16, 1993, *available at* https://www.leg.state.nv.us/statutes/67th/Stats199303.html#Stats199303page515 (last accessed April 24, 2019). It appears that there was a case pending in the Nevada courts at the time of the repeal which could have led to a ruling on the issue of whether the law was constitutional, but that it was dismissed as moot when the state legislature repealed the law. *See* Timothy Pratt, "Nevada's sodomy law came a decade ahead of U.S. ruling," Las Vegas Sun, June 26, 2003, *available at*

https://lasvegassun.com/news/2003/jun/26/nevadas-sodomy-law-came-a-decade-ahead-of-us-rulin/ (last accessed April 24, 2019).

Under the rule implied by the BIA's decision in this case, if appeals against deportation orders had reached the BIA in 2000 for two noncitizens who had 1990 convictions for same-sex sexual activity in Kentucky and Nevada, respectively, the results would be different. A noncitizen with a Kentucky conviction from 1990 who got his conviction set aside based on the 1992 decision in *Commonwealth v. Wasson* could successfully argue that his conviction had a substantive defect. A noncitizen with a Nevada conviction from 1990 who had his conviction set aside based on the 1993 legislative repeal of the provision under which he was convicted, on the other hand, apparently would be told by the BIA that this conviction was still valid for immigration purposes, as in the instant case. The absurdity of that result illustrates the problem with the rule applied by the BIA in this case.

D. Fortuities of Timing in the Actions of a State Court Versus a State Legislature Should Not Determine the Continuing Validity of Convictions for Immigration Purposes

Once a state's highest court has legalized or decriminalized certain conduct on the basis of the state constitution, whether it be marijuana possession as in *Ravin*, or same-sex marriage as in *Goodridge*, the state legislature would have little incentive to take action to do the same. Conversely, if conduct is legalized or

decriminalized by the legislature and records of prior convictions destroyed by law, the state courts will have little reason to address whether prior criminal convictions, the records of which have been destroyed, were compliant with the state constitution. Indeed, as occurred in Nevada with respect to same-sex sexual activity, a constitutional challenge may be dismissed as moot specifically because legislative action had made it so. *See* Pratt, *supra*.

The BIA's approach appears to suggest that under these sorts of circumstances, whether convictions retain their effect for immigration purposes under *Pickering* and *Pinho* will depend on the fortuity of whether the state legislature or the state courts have acted first. That cannot be right.

Instead, the BIA, and this Court, should recognize that legislative decriminalization, accompanied by destruction of the records of past convictions, which removes the necessity of judicial decriminalization, has the same effect in terms of establishing a substantive defect in those past convictions that judicial action would have had. Whether the state courts move first and render it unnecessary for the legislature to act, or the legislature moves first and renders it unnecessary for the state courts to act, the result should be the same. A determination by the state that certain conduct should not be criminal, and that past convictions for that conduct should be vacated or expunged, renders those past

convictions substantively defective under *Pickering* and *Pinho*, and thus no longer valid for immigration purposes.

IV. BIA Failure to Give Effect to State Decriminalization Is Inappropriately Disrespectful of the State's Sovereign Decision

Once the state, through either its judiciary or its legislature, has made the judgment that certain conduct should not be criminal and should never have been criminal, it is disrespectful of the state's sovereign judgment for the federal government to continue to treat convictions by that state for that conduct as criminal. The state, in enacting statutes like those at issue here, is not making the judgment that a particular offender has been rehabilitated since committing a crime, but rather is making the judgment that the purported crime should not be a crime.

To suggest that legislation effectuating this judgment is merely an effort to relieve offenders of the consequences of their convictions, as the IJ did here, is to engage in the sort of tendentious mind-reading with respect to state legislators that *Pinho* cautioned against engaging in with respect to state judges and state prosecutors. Speculation by federal agencies about the secret motives of state legislators is no more compatible with federalism than "speculation by federal agencies about the secret motives of state judges and prosecutors". *Pinho*, 432 F.3d at 215. If the state legislature has taken actions which, on their face, seek to render conduct no longer criminal and to remove from history the record of that

conduct having been criminal in the past, IJs and the BIA do not have license to speculate that what was actually sought to be accomplished was merely the provision of rehabilitative relief from the consequences of criminal conduct.

Certainly, relief from the consequences of a putative conviction for something later determined not to be a crime is one benefit of vacating or destroying the record of that conviction, but what the Connecticut legislature has done goes further than merely providing that benefit. Destruction of the record of conviction, as the chairman of the relevant committee in the Connecticut House explained when he urged the House to pass what is now CGS § 54-142d, recognizes that the beneficiary of that destruction was "convicted of a crime which this General Assembly subsequently decided . . . had not been a crime." Remarks of Rep. Tulisano, Legislative History for Connecticut Act HB-5314, PA 6, 1983, http://ctstatelibrary.org/wp-content/lh-bills/1983_PA6_HB5314.pdf at 4 (last accessed April 24, 2019). This represents a substantive defect in the prior conviction for a non-crime, and so such a conviction should not remain valid for immigration purposes under *Pickering* and *Pinho*.

CONCLUSION

Amici curiae, American Immigration Lawyers Association, the National Immigration Project of the National Lawyers Guild, and Immigrant Defense

Project, respectfully request that this Court consider this brief in the above-captioned matter and grant the Petition for Review.

Dated: New York, NY
April 26, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 29(a)(5)

This brief complies with FRAP 29(a)(5) because the brief contains 4,799 words of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). (There are 5,897 words within the document, minus 96 words in the cover page, 81 words in the corporate disclosure statement, 540 words in the tables of contents and authorities, and 381 words in the certificates of compliance and service.)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Standard 2013 in 14-point Times New Roman typeface.

/s/ David A. Isaacson
David A. Isaacson, Esq.
Attorney for Amici Curiae

Dated: April 26, 2019

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 28.3(d)

I hereby certify that at least one of the attorneys whose name appears on this brief is a member of the bar of this court. Specifically, I, David A. Isaacson, am a member of the bar of this court.

/s/ David A. Isaacson
David A. Isaacson, Esq.
Attorney for Amici Curiae

Dated: April 26, 2019

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 31.1(c)

I hereby certify that the text of the electronic brief is identical to the text in the paper copies. I further certify that a virus detection program, Bitdefender Endpoint Security Tools version 6.6.9.134, has been run on the file and that no virus was detected.

/s/ David A. Isaacson
David A. Isaacson, Esq.
Attorney for Amici Curiae

Dated: April 26, 2019

CERTIFICATE OF SERVICE

I, DAVID A. ISAACSON, an attorney duly admitted to the bar in the State of New York and the bar of the Court of Appeals for the Third Circuit, hereby affirm under penalty of perjury, that on April 26, 2019, I served a copy of this Brief of Amici Curiae the American Immigration Lawyers' Association, the National Immigration Project of the National Lawyers' Guild, and Immigrant Defense Project, and any attachments, by the Court's cm/ecf electronic filing system upon:

Surell Brady, Esq.
United States Department of Justice
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Dated: New York, New York
April 26, 2019

/s/ David A. Isaacson
David A. Isaacson